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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 627

WAREHOUSEMEN'S UNION, LOCAL 117, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF THEREON.

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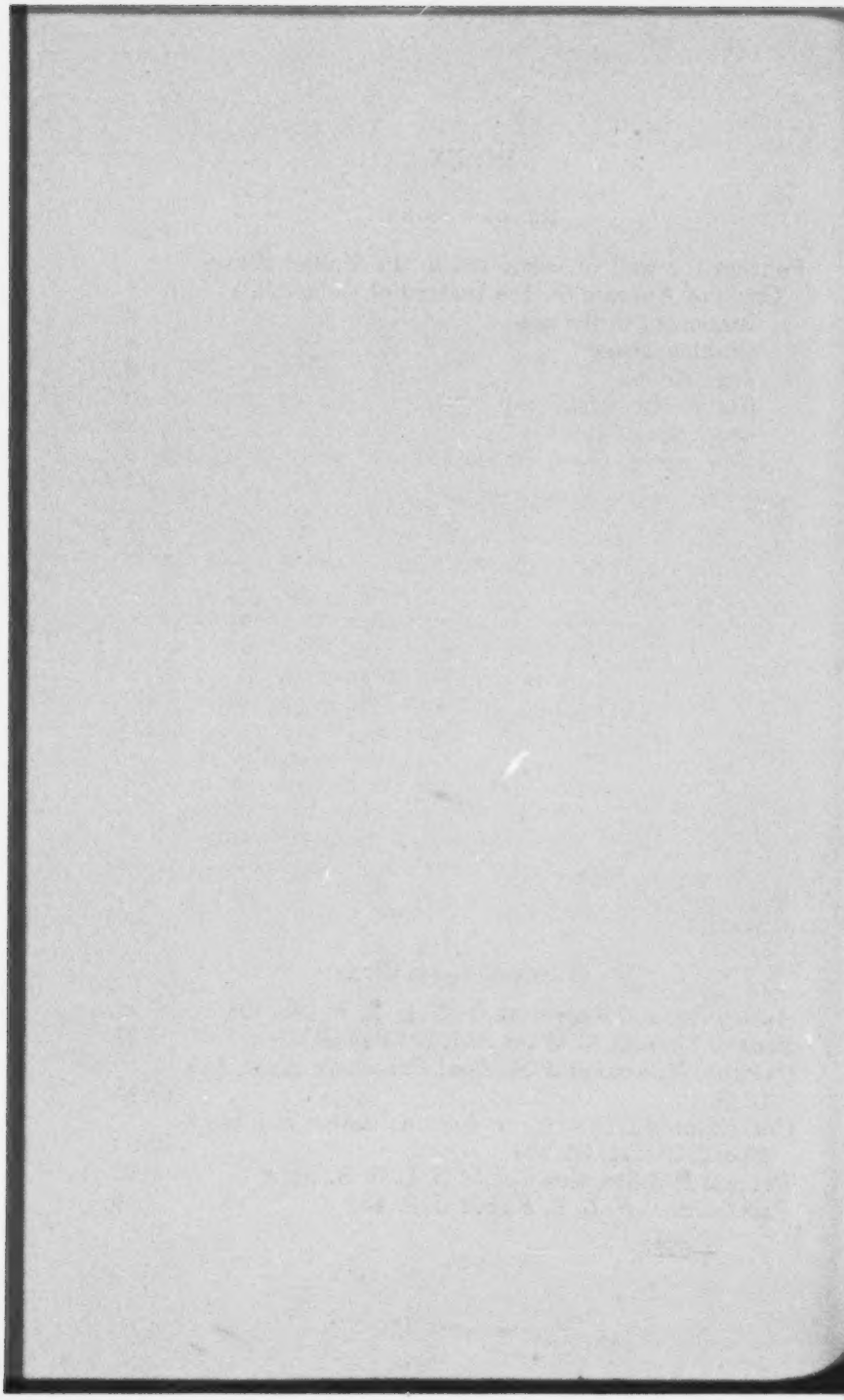

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No.

WAREHOUSEMEN'S UNION, LOCAL 117, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Warehousemen's Union, Local #117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, affiliated with the American Federation of Labor, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, rendered

on May 5, 1941, in the case entitled "Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, affiliated with the American Federation of Labor v. National Labor Relations Board; National Labor Relations Board v. McKesson & Robbins, Inc., McKesson-Stewart-Holmes Drug Division; McKesson & Robbins, Inc., Blumauer Frank Drug Division; and William J. Wardall, Trustee in Bankruptcy", affirming an order of the National Labor Relations Board dated January 23, 1941.

Statement of the Case.

Petitioner, Warehousemen's Union, Local 117, (hereinafter called the Teamsters) is an unincorporated association doing business as a labor organization. It is affiliated as a local with the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an international labor organization affiliated with the American Federation of Labor (R. 504).

This case is an appeal from a divided decision of the United States Court of Appeals for the District of Columbia affirming an order of the National Labor Relations Board directed against McKesson & Robbins, Inc., a wholesale drug company incorporated under the laws of the State of Maryland, operating a large number of warehouses throughout the United States (R. 502-503). The order of the Board adversely affected petitioner in that it had entered into a collective bargaining contract covering the employees of two of the Company's warehouses located in Seattle, Washington, which contract the Board had directed the Company to disregard. Moreover, the Board had ordered the Company not to recognize petitioner as the representative of any of its employees in these warehouses (R. 528).

The order and decision of the Board was dated January 23, 1940. The case before the Board was entitled "In the Matter of McKesson & Robbins, Inc., and International Longshoremen & Warehousemen's Union, Local No. 9, District 1, affiliated with the C. I. O.", 19 N. L. R. B. 85 (R. 498-529) and arose upon charges filed by International Longshoremen & Warehousemen's Union, Local No. 9, District 1, affiliated with the C. I. O. (hereinafter called the C. I. O.). These charges alleged in substance that the Teamsters did not represent a majority of the employees in the two warehouses in question as required in Section 8(3) of the National Labor Relations Act at the time the collective bargaining contract containing closed-shop provisions was entered into, and that accordingly discharges under such closed-shop contract were in violation of the Act (R. 498). As will hereafter be seen, these charges were filed by the C. I. O. when a petition for representation previously filed by it was pending and were pressed only after the Teamsters had won an election conducted pursuant to such petition by the Board, in which election the C. I. O. had participated without protest and which the Board had conducted with full knowledge of all of the facts constituting the alleged unfair practices and with full knowledge of the pendency of the foregoing charges.

The alleged unfair practice—contracting with a minority group—on which the Board order was predicated arose from the following circumstances:

During the year 1936 a dispute concerning jurisdiction and right to organize employees of inland warehouses arose between the International Brotherhood of Teamsters and the International Longshoremen's Association, both International organizations affiliated with the American Federation of Labor. This dispute, known generally as a "jurisdictional dispute", represented efforts of the two labor organizations to secure a livelihood for their respective

members (R. 505). The dispute was national in scope, affecting all owners of inland warehouses (R. 243, 259). McKesson & Robbins became involved in the dispute through five of its West Coast warehouses. We are concerned with only those two of these warehouses—namely, McKesson-Stewart-Holmes Drug Division and Blumauer Frank Drug Division—which were covered by the contract abrogated by the Board. The two locals competing for membership at these warehouses were the petitioner and Warehousemen and Cereal Workers' Local Union 38-117, affiliated with the International Longshoremen's Association. As a result of the dispute and the consequent striking and picketing these five warehouses were closed down and remained closed from January, 1937, to June, 1937, at a great loss to the public, the employees and the employer (R. 504-505). They were reopened in June at a considerable cost to the employer (who had, in the meanwhile, transferred operations elsewhere) (R. 398) through the efforts of a "Citizens Committee", consisting of civic leaders in Seattle (R. 505). This Committee sponsored a Truce Agreement, which was signed not only by the unions involved but by each of the employees employed at the various warehouses, and was agreed to by the employer (R. 436-438, 508).

The meaning and intent of this agreement is one of the principal issues in this case, for it was in reliance on this agreement that the employer and the Teamsters later entered into the collective bargaining contract which the Board ordered disregarded. Briefly, the agreement provided that the employees would return to work under their then existing affiliations, the parties to await the decision of the American Federation of Labor Convention resolving the conflicting jurisdictional claims of the International Unions. The unions were to maintain a hands-off policy until that time, and all parties specifically agreed

to abide by the decision of the Convention as a means of finally settling the dispute (R. 436-438). At the time the Truce Agreement was entered into the imminent probability that the I. L. A. local would secede from the International Longshoremen's Association to go to the C. I. O. was well known to all the parties (R. 508). However, the agreement signed by the parties at the two warehouses in question contained no proviso covering that probability, the commitments to abide by the Convention decision being unconditional. At the three other warehouses the Truce Agreement was supplemented by an express commitment to abide by the decision, regardless of a change in affiliation, but through inadvertence this implementing memorandum was never presented to the employees at the two warehouses in question (R. 507-508).

In August of 1937, Warehousemen and Cereal Workers' Local Union No. 38-117, along with several other I. L. A. locals on the West Coast, seceded from the I. L. A. and became International Longshoremen & Warehousemen's Union, Local No. 9, District 1, affiliated with the C. I. O. (R. 383-386). The I. L. A. itself, however, retained its affiliation with the American Federation of Labor as an international organization and was not appreciably affected by the secession of the West Coast locals (R. 252-253).

At the October Convention of the American Federation of Labor, attended by delegates of the International Brotherhood of Teamsters and the International Longshoremen's Association, the Convention sustained the contentions of the Teamsters' organization (R. 323, 509). Within two weeks petitioner local notified the employer of the Convention decision and demanded a closed-shop contract, relying for its necessary majority on the commitments made by the individual employees to abide by the Convention decision (R. 401). The employer, likewise relying on the agreement, signed the contract on November 15, 1937,

and some sixteen employees who refused to change affiliation were discharged (R. 38-40, 44, 47, 48, 52-53, 140-142, 299, 316). Neither the C. I. O. union nor the individual employees signing the Truce Agreement had notified the employer or the Teamsters of any intention not to live up to the agreement following the secession in August (R. 345).

Shortly previous to the signing of the contract—on October 28th—the C. I. O. filed a petition for representation under Section 9 of the Act (R. 514). The Board conducted hearings upon such petition from November 18th through November 22, 1937 (5 N. L. R. B. 70, 72), and at these hearings all of the evidence respecting the making of the closed-shop contract of November 15th and the Truce Agreement of June was brought forth on the question of whether the contract constituted a bar to an election (R. 239, et seq.). At the conclusion of the hearing before the Trial Examiner, the C. I. O. filed its charges upon which the present order was subsequently based (R. 209).

A decision in the Representation case was not reached by the Board until February 4, 1938 (5 N. L. R. B. 70). In that decision the Board, upon reasoning similar to that later to be employed by it in finding the company guilty of unfair labor practices, found that the closed-shop contract and the circumstances of the making of the contract did not constitute a bar to an election (5 N. L. R. B. 70, 81). It ordered an immediate election, but made eligible to vote in that election only employees who were on the payroll the week of October 28, 1937, a date two weeks prior to the making of the closed-shop contract (5 N. L. R. B. 70, 86). This election was voluntarily participated in by all parties, the C. I. O. making no protest because of the existence of the closed-shop contract or of the circumstances surrounding the making of it, or because of the existence of any claimed or alleged unfair practices on the part of the com-

pany (R. 198). The election resulted in a vote of 32 in favor of the Teamsters' Union, and 27 in favor of C. I. O. Local No. 9. The Regional Director, who conducted the election for the Board, recommended to the Board that the Teamsters' Union be certified as exclusive bargaining agent (R. 200-201). The Board took no action upon such recommendation, although repeatedly urged to do so. In July, 1938, five months after the election, the Board issued a complaint against McKesson & Robbins, Inc., based upon the charges filed November 23, 1937 (R. 211).

A hearing on this complaint was held in September, 1938. In January, 1940, the Board issued a Decision and Order finding the company had violated sections 8 (1) and 8 (3) of the Act, and ordering the Company not only to cease giving effect to the Teamsters' closed-shop contract but also to withdraw all recognition from the Teamsters' Union (R. 498, *et seq.*). This was ordered in spite of the results of the election which the Board itself had ordered and conducted. The Board also ordered the company to reinstate certain of those employees who had been discharged on November 17th (R. 527-8-9). The Board found that the Truce Agreement was intended to be inoperative in the event of secession, and held it therefore constituted no authorization or basis for the closed-shop contract (R. 518).

The petitioner thereupon appealed from this order as an aggrieved party by petition for review, and the Board cross-petitioned for enforcement of its order against the employer (R. 1, 13). The court below, in a two to one decision, dismissed petitioner's petition for review and granted the Board's order of enforcement, with a slight modification not affecting petitioner's position. Chief Justice Groner dissented. Petitions for rehearing filed by both petitioner and McKesson & Robbins on May 20, 1941, were denied on June 21, 1941 (R. 598).

Opinion Below.

The decision and order of the Board are reported in 19 N. L. R. B. 778 and appear on pages 497-530 of the record. The opinion of the court below is reported in 121 F. (2d) 84 (Adv. Sheets). It appears in the record at R. 543, *et seq.*

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended and under Sec. 10 (f) of the N. L. R. A. The decree of the United States Court of Appeals for the District of Columbia was rendered May 5, 1941, and petition for rehearing was filed May 20, 1941, and denied June 21, 1941.

Statute Involved.

The statute involved is the National Labor Relations Act, 29 U. S. C. A., Sections 151, *et seq.* The pertinent provisions of the Act are Section 7, Section 8 (1) and 8 (3) and Section 9 (c). These provisions are set forth in the Appendix.

Questions Presented.

Three fundamental issues are involved in this appeal. They are: (1) did the Board act arbitrarily in ordering an election voluntarily participated in by all parties and then, on the basis of facts known to it at the time the election was ordered, repudiating the result; (2) was it the intent of the Truce Agreement, pursuant to which the closed-shop contract was made, that the parties abide by the American Federation of Labor Convention decision regardless of the subsequent change in affiliation of the I. L. A. local, the commitments to abide being unconditional although all parties knew of the probability of the contingency occurring; (3) do the facts or any policy of the Act warrant an order

that the employer refrain from dealing with or recognizing the Teamsters as the representative of *any* of its employees there being no finding or charge that the Teamsters did not validly represent at least *some* employees.

Reasons Relied On for Allowance of Writ.

1. This case presents an important question concerning the existence or extent of an asserted power of the National Labor Relations Board, under the National Labor Relations Act, arbitrarily to disregard a prior representation proceeding conducted by it under Section 9 of the Act in a subsequent unfair practice proceeding conducted by it under Section 10 of the Act, involving the same parties, where the principal issue in both cases was identical, and to repudiate, on the basis of facts previously known to it, the results of an election ordered by it pursuant to the representation proceeding and voluntarily participated in by all of the parties. The action of the Board in this case is assertedly contrary to the provisions of the National Labor Relations Act and in excess of the authority conferred upon the Board thereunder, and the question of the validity of the Board's attempted exercise of power in this case has not been, but should be, settled by this Court. It is of obvious importance to all labor organizations to ascertain the extent of the Board's power to repudiate its own elections, and it is of obvious interest to the general public to ascertain whether industrial peace can be insured by the procedure adopted by the Board in this case. Further, the decision of the majority below in upholding the procedure of the National Labor Relations Board in ordering an election and then repudiating it without rhyme or reason sanctions a departure by the National Labor Relations Board from the accepted and usual course of judicial procedure such as to call for an exercise of this Court's power of supervision.

2. The court below in its interpretation of the Truce Agreement as not being binding in the event of secession, thus inserting into a written contract a proviso which might have been but was not inserted by the parties, has decided an important question of local law regarding contract interpretation in conflict with applicable State court decisions, as well as in conflict with applicable leading decisions of this Court and in conflict with leading decisions of other circuit courts of appeal on the same matter. These decisions are *Chicago, Milwaukee & St. Paul Railway* v. *Hoyt*, 149 U. S. 1; *Johnson* v. *Igleheart Bros.*, 85 Fed. (2d) 4; and *McBride* v. *Callahan*, 173 Wash. 609, 24 Pac. (2d) 105, all of which hold that where there are known contingencies affecting performance which might have been but were not provided against in a written contract the parties are bound by the unconditional commitments. In the interest of justice and to correct manifest error, as well as in the interest of harmonizing the decisions of the circuit courts concerning questions of contract interpretation, it is necessary that the failure of the court below and of the Board to apply elementary principles of contract construction be remedied by this Court.

3. The Board's order directing the employer not to deal with the Teamsters as the representative of *any* of its employees, although the Board found the Teamsters represented at least *some* of such employees, and the only unfair practice of the employer was dealing with the Teamsters as representative of *all* its employees, is punitive, has no support in factual findings, and effectuates no policy of the Act. The decision below sustaining such order is in conflict with the decision of this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 59 Sup. Ct. 206, and is manifestly error. The determination of whether the Act permits the Board to deny a labor

organization the right to represent *any* of its members under the circumstances of this and similar cases is of utmost importance to all labor organizations. The question has not been, but should be, settled by this Court.

Prayer.

Wherefore, the petitioner respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the District of Columbia, entered on May 5, 1941, affirming an order and decision of the National Labor Relations Board, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioner will ever pray.

WAREHOUSEMEN'S UNION, LOCAL 117, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR,

Petitioner,

By JOSEPH A. PADWAY,
HERBERT S. THATCHER,
ROBERT A. WILSON,

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Washington, D. C.

Dated this 19th day of September, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

WAREHOUSEMEN'S UNION, LOCAL 117, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Specification of Error.

1. The United States Court of Appeals for the District of Columbia erred in affirming the power of the Board arbitrarily to repudiate the results of an election ordered and conducted by it.

2. The court below erred in upholding the Board's construction of the Truce Agreement on which the closed-shop contract was predicated and in finding that it was the intent of the parties that the Truce Agreement become inoperative

in the event of the secession of the I. L. A. local from the I. L. A. and the American Federation of Labor.

3. The court below erred in upholding the Board's order directing the employer to disregard its collective bargaining contract with the Teamsters' organization.

4. The court below erred in upholding the Board's order denying petitioner the right to represent any of the employees of McKesson & Robbins, Inc., in the two warehouses in question.

ARGUMENT.

I.

The Board acted arbitrarily and in excess of its power in directing the election and then repudiating the result.

The mere statement of the Board's action in ordering an election and then repudiating the result without rhyme or reason speaks for the invalidity of such action. Granted that the Board's discretion in the conduct of proceeding under Section 9 and Section 10 of the Act is extremely broad, nevertheless, this discretion is one which cannot be exercised in an arbitrary manner and in a manner in disregard of its own proceedings.

As we have seen, the representation hearings on the C. I. O. petition required inquiry into the entire circumstances of the making of the Truce Agreement and the making of the closed-shop contract. Before a decision was reached in the representation case, the C. I. O. filed charges against the Company based solely on the alleged invalidity of the contract. The Board, nevertheless, ordered a predated election to which the C. I. O. made no objection. The Teamsters' union won the election, but the Board refused to follow the Regional Director's recommendation that the Teamsters be certified, instead proceeding on the charges previously filed. The decision in the unfair practice case

was based upon reasoning exactly similar to that employed in the representation decision, and indeed upon the same record.[1]

Why the action of the Board in this case is arbitrary, and why the proceeding in the representation case must necessarily constitute a bar to the proceeding in the unfair practice case, becomes obvious when the two proceedings are compared and when there is noted the identity of the issue in each case and the complete inconsistency of their purposes. Petitioner recognizes, of course, that, for the most part, representation proceedings under Section 9 of the Act differ from unfair labor practice proceedings under Section 10 of the Act, the purpose of the one being primarily to ascertain majority representatives and determine bargaining units, and the purpose of the other being to remedy unfair labor practices on the part of employers. However there are certain limited classes of cases where the issue in a representation proceeding is identical with the issue involved in an unfair practice proceeding. These involve representation cases where a contract is asserted as a bar to an election in a representation proceeding and the Board ascertains whether the person asserting the contract represented a majority at the time the contract was made, and complaint cases where the employer's sole unfair practice is the making of a closed-shop contract with a minority group. The Board itself notes the similarity of these classes of cases. See Third Annual Report, page 134; Fourth Annual Report, page 74; Fifth Annual Report, page 55. In these cases, as in the present case, the issues in both types of proceedings are identical and the evidence is identical, both relating to the existence of a majority. A demonstration of the lack of a majority in either case is sufficient to constitute

[1] The entire record of the representation hearing was stipulated as part of the record in the unfair practice hearing and constituted the major portion thereof (R. 223-224).

the employer's action in entering into such contract with the minority group a violation of the Act.

In both the representation and unfair practice hearings in the present case the evidence concerned itself solely with the circumstances surrounding the making of the Truce Agreement, in reliance on which the closed-shop contract was entered into. The inconsistency in the two proceedings in this case arises from the different objects of each. It was the object of the representation proceeding to ascertain and designate a majority bargaining representative—to *grant rights of exclusive recognition* to the winner of the election conducted by the Board. It was the purpose of the unfair practice proceeding to *deny or deprive an organization of exclusive bargaining rights* if that organization did not represent the majority—to require the employer to cease from recognizing or dealing with that group as exclusive representative. Proceeding to an election in the one case is directly negated by a proceeding to unseat the representative in the other hearing. If one of the organizations participating in the election was not entitled to bargaining rights as asserted in subsequent proceedings based upon facts known to the Board at the time it ordered the election, then, of course, it was meaningless to order and conduct such election.

What the Board, in effect, is arguing for in the present case by insisting on the difference between the two types of proceedings conducted by it under Section 9 and Section 10 of the Act, in spite of the identity of the issues and evidence in classes of cases like the present one, and in spite of the inconsistency of the purpose of each, is the power to take away with its left hand what it has given with its right. That is the essence of the Board's procedure in this case, and its claim to exercise such power is manifestly in disregard of all principles of equitable procedure and of fair

play, and is not to be obscured by the drawing of superficial distinctions.

It may be true, as asserted by the court below, that the mere finding by the Board that the closed-shop contract was not a bar to the election did not in itself determine whether there were or were not unfair practices. However, *in going further and ordering an election,* determination as to the existence of unfair practices necessarily must have been made, for the reason (1) that the Board does not, and could not be expected to, conduct an election where the free choice of the employees might be affected by unfair practices (see Third Annual Report, page 143; Fourth Annual Report, page 77; *Matter of American-France Line, etc.,* 3 N. L. R. B. 64), and (2) it cannot be presumed that the Board would do a vain or useless thing, and therefore, in ordering an election, it must have considered an election proper and truly expressive of the free choice of the employees.

The election was voluntarily participated in by the C. I. O.; the Board itself conducted and supervised the balloting; there was no charge of any interference or coercion at the time of the election; the Teamsters won the election; and the Regional Director recommended certification. The Board, however, refused certification, not on the basis of any new circumstances, not on the basis of any new charges, but solely on the basis of charges pending when it had ordered the election and upon the basis of facts brought forth and known to it prior to the time it ordered the election.

The sole excuse offered by the Board for this extraordinary procedure was that it had no knowledge of the pendency of the charges of unfair labor practices at the time it ordered the election.

One answer to this contention is that the evidence at the representation hearing, and discussed at length in the deci-

sion, was sufficient in itself to constitute notice of the possibility of unfair practices. Another and shorter answer is that the Board's own Rules and Regulations (Article II, Section 2) specifically provide that charges of unfair practices can be filed only with the Regional Director. In what manner other than filing charges with the Board's agent, as required by the Board's rules, the Board can be put on notice of such charges, the Board does not attempt to state.

The court below and the Board argue that under Section 9(c) of the Act representation proceedings and unfair practice proceedings may be conjoined, and that that is in effect what was done here. However, it is not possible to conjoin such proceedings after the event. When an election has been ordered, it is too late to join the proceedings, for it is the purpose of joining unfair practice proceedings with representation proceedings to remedy any unfair practice which might affect the free choice of the employees *prior* to holding the election contemplated in the representation case. For obvious reasons, it is only *after* the unfair practices have been remedied that the Board orders and conducts an election. See *Falk Corp.* v. *N. L. R. B.*, 308 U. S. 453.

The remarks of Chief Justice Groner, in his dissenting opinion, characterizing the Board procedure as arbitrary, succinctly sum up the arguments:

> "I understand that the purpose of the National Labor Relations Act is to insure to employees an opportunity for a free determination of the union to represent them in their relations with the employer. The certain method of ascertaining the preference is a fair and untrammeled election. Putting to one side, therefore, the question whether in the present instance all the parties were bound by the so-called truce agreement on the jurisdictional question, as in good faith they undoubtedly were, I am nevertheless of opinion that the Board,

in ordering and holding an election and then repudiating the result, has acted arbitrarily.

"1. The election was ordered with the full knowledge on the part of the Board that the employer, acting under the binding conditions of the truce agreement, had signed the closed shop contract with the Teamsters.

"2. It was obviously its purpose to determine which of the unions represented the majority of the men.

"3. There was neither charge nor evidence of coercion of the electorate on the part of the employer.

"4. The persons eligible to vote were designated by the Board.

"5. The election was conducted by the Board, and the employer took no part in it.

"6. No one claims it was not fairly held and the result fairly determined.

"7. The Board was then as fully informed of all the charges on which it subsequently acted as it was when it later repudiated its own action and set aside and annulled the election.

"In the circumstances, I am wholly unable to find any justification for its course, and I am even more unable to find justification for its further action in ordering the employer not to recognize Teamsters as the bargaining representative 'of any' of its employees when the only evidence in hand showed that union as the choice not only of many but of an established majority."

Two very obvious results of countenancing the Board's procedure in this case are these: (1) it would permit the Board to conduct elections and then repudiate the result where a labor organization it did not favor won the election; by conducting a series of elections it could insure victory for any organization it might prefer; (2) the order-

ing of elections, the participation in them by competing unions, and the Board's repudiation of the result on the basis of facts known to it prior to the time it ordered the election, would inevitably result in industrial turmoil—protest strikes and protest picketing. It is impossible to conceive of any purpose of the Act that could be effectuated by the procedure sanctioned by the court below. It cannot be that the Board was attempting to protect the interests of the C. I. O. local or its members, because that local and its members freely and voluntarily participated in the election, expecting to abide by its result. It cannot be that the Board was attempting to preserve industrial peace, for industrial peace did exist from the time of the contract of November 15th until the Board's order repudiating the contract over two years later. The ordering and holding of a formal election is a serious matter, not to be lightly undertaken or arbitrarily disregarded. Employees are keyed up to the election for weeks ahead of time; organizational activities are increased, and all the tension of an important political campaign obtain. It cannot reasonably be expected that an organization which has won such an election, ordered and conducted by the Board and fairly participated in by all employees, would willingly consent not only to a subsequent repudiation of the results of that election based solely on facts known to the Board when the election was ordered, but, in addition, an order directing the employer not to deal with it for any of its members. If the policy and purposes of the Act are to be achieved, surely a sensible and reasonable precaution to that end would be to refuse to countenance arbitrary exercise of power asserted by the Board in this case.

It is submitted that the decision of the court below has sanctioned a departure from the accepted and usual course of judicial proceedings, which, moreover, is in derogation and not in furtherance of the purposes of the Act, and that

this Court should exercise its power of supervision to control the arbitrary exercise of power contended for by the Board in this case.

II.

The court's construction of the truce agreement, on which Board-repudiated contract was based, is erroneous.

The second issue in this case relates to the interpretation of the Truce Agreement of June, 1937. Petitioner asserts that the court below in its construction of that agreement failed to apply applicable decisions of this Court, of the Federal circuit courts and of the courts of the State of Washington where the agreement was entered into.

The significance of the Truce Agreement, of course, is that it constitutes the basis and the justification for the closed-shop contract of November 15th. Compliance with the Truce Agreement would afford the majority required for a closed-shop contract. As before explained, the issue in the unfair practice case was simply whether the Teamsters had represented a majority of the employees when the closed-shop contract was entered into. There was no contention that the employer violated the Act in any respect other than to have made a contract with the minority. The employer is not charged with having interfered with or coerced its employees or having afforded assistance to the Teamsters in obtaining their membership.

Since the parties had entered into the closed-shop contract primarily in reliance on the Truce Agreement, it is necessary to examine the meaning and intent of that agreement to see whether it in fact bound the individual signatories thereto to compliance with the decision of the American Federation of Labor Convention and consequent change of affiliation, regardless of a subsequent secession of the I. L. A. local from the International organization and from the American Federation of Labor. Petitioner asserts

the agreement did so bind the employees signing it; the Board found that the agreement was not intended to so bind the employees, and its construction of the agreement was upheld by the court below.

The issue respecting the validity of the Truce Agreement under the National Labor Relations Act, assuming the Teamsters' interpretation was correct, was not passed upon by the Board or by the court below, although argued and briefed before the latter body. In this respect, however, it might be said that the binding effect of individual or collective commitments as to retention of affiliation during their terms have been affirmed in recent decisions of the circuit courts *National Labor Relations Board* v. *Electric Vacuum Cleaner Company, Inc.*, 120 F. (2d) 611 (individual designations of bargaining representative for year period held to preclude attempt to change affiliation during such period); *Peninsula & Occidental S. C. Co.* v. *National Labor Relations Board*, 98 F. (2d) 41 (employees held precluded from attempting to change representative during term of preferential shop contract);—by the New York Court of Appeals and Errors in the matter of *Triboro Coach Corporation*, decided July 29, 1941, L. R. R., Vol. VIII, page 845 (employees held precluded from changing affiliation during term of two-year collective bargaining agreement)—and by the Board itself in the case of *Ansley Radio Corporation*, 18 N. L. R. B., No. 108, and in the case of *Douglas and Lomason Co.*, 34 N. L. R. B. No. 8.

Indeed, any attempt to secure security and stability through collective bargaining relationships would clearly seem to require adherence to reasonable commitments as to affiliation and choice of bargaining agent when freely entered into by employees in any particular unit. The adherence to such commitments would seem to be particularly required in cases such as the present one where there was ample consideration for the commitments and a change in position was

caused thereby. In this case, it must be remembered, the employer opened the warehouses pursuant to the Truce Agreement only at very great cost to itself; the employees were returned to their former positions without discrimination; and the Teamsters' union gave up its right to attempt to organize the employees during the entire period of the Truce Agreement.

The Truce Agreement, sponsored by a group of Seattle civic leaders and agreed to by the unions and the individual employees, reads as follows:

"June 9, 1937.

"In order that the unfortunate jurisdictional dispute between your respective organizations, which has prostrated for months the Bemis Bag Company, the West Coast Kalsomine Company, and three wholesale drug establishments in our city, depriving the employees of those concerns of work and ruining the business of the industries involved, we desire to make the following proposition as a basis for settlement:

"1. That the industries immediately open their plants under guarantees by both unions that the workers will be permitted to return to work, and the products will be hauled and delivered without interference.

"2. That each employee of those concerns return to work under his or her present union affiliations, and that the ILA will appeal from the decision of the Executive Council of the American Federation of Labor to the October convention of that organization, to be held in Denver, Colorado.

"3. That both organizations agree to be bound by the final decision of that convention. The pending suit will be dismissed with prejudice as to all parties.

"4. If no appeal is taken by the ILA to the convention, both unions agree to abide by the present decision of the Executive Council.

"5. This agreement shall become effective when signed by the officers of the unions, and the signing of this agreement by the employees shall entitle such em-

> ployee signing to the same position which he or she held at the time the strike was declared. Such employment to commence as rapidly as work can be provided."

This agreement was signed by the representatives of the unions, both local and regional. Immediately following this agreement was attached the following paragraph, to which the individual employees affixed their signatures:

> "The undersigned employees, fully understanding the within agreement, hereby approve the same and agree to be bound thereby."

Leaving aside for the moment the question of the intent of the parties in the event of secession, it is not disputed or controverted in any way that, had no secession taken place, it was the purpose of the agreement to require compliance with the Convention decision by a change in affiliation in conformance with the Convention designation of jurisdiction. Under normal circumstances, the employees who were members of the Longshoremen's Union would have been obliged to give up their affiliation with that organization and affiliate with the Teamsters' organization. The agreement of the individual employees and of the unions to "abide" by the decision can have no other meaning which would make sense or which would be consistent with the purpose of the entire agreement—to afford a means of finally settling the controversy which had so grievously disrupted the peace of the community and the business of the employer. Thus, the Teamsters, had the agreement been lived up to in spite of the secession, would have the required majority.[2]

[2] The question concerning the duration of the Truce Agreement—whether it was effective for a definite time or a reasonable period of time—was commented but not passed upon by the court below. The Teamsters applied to the Company for the contract within two weeks after the Convention decision. Obviously, if the agreed upon settlement of the dispute would in any way effectuate its purpose—to achieve a final settlement of the dispute—it must have been intended to be effective for a minimum reasonable period of time after the Convention decision (pursuant to which the parties were to change their affiliation) was made, or the agreement would have been meaningless and without effect.

The sole question then, is whether the agreement manifested an intent on the part of the parties that it become inoperative in the event of secession of the I. L. A. local. Before considering the terms of the agreement itself, it is important to note that at the time of entering into the agreement the I. L. A. local and its members signing the agreement knew that there was a great possibility that the local would secede from the International and join the C. I. O. Further, it should be noted that the underlying and fundamental purpose of the agreement was to permanently and finally settle the bitter dispute which had so long disrupted the business of the employer and disrupted the peace of the community (R. 398, 181, 273, 280, 247, 248). The parties, then, knowing this, nevertheless agreed in plain, unequivocal language "to be bound by the final decision of the Convention". This undertaking was made without any reservation or condition whatsoever in the agreement.

Under such circumstances, the applicable principle of contract law is clear. The authorities are unanimous in holding that, where a condition exists which might affect performance of a contract, and such condition is known to the parties to the contract but no exception or provision is made therefor, the parties are presumed to intend that the occurrence of the condition, if it occurs, shall not operate to affect the performance of the contract. The rule has its basis, of course, in the desire to achieve certainty and definiteness in contract relationships where the parties have undertaken to reduce their agreement to writing. The contract must speak for itself, and the courts may not add to a contract that which it does not contain. The rule has been stated by this Court in the leading case of *Chicago, Milwaukee & St. Paul Railway* v. *Hoyt*, 149 U. S. 1, as follows:

> "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay

damages for the non-performance, and such construction is to be put upon an unqualified undertaking, *where the event which causes the impossibility might have been anticipated and guarded against in the contract,* or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." (Emphasis ours.)

A leading Federal decision on the question, in which a number of the Federal cases are discussed, is *Johnson* v. *Igleheart Bros.*, 85 F. (2d) 4:

"It is urged upon us, however, that notwithstanding the want of express language to cover the situation presented, the court should construe the contracts as containing an implied promise to refund to the plaintiff that part of the purchase price which went to make up the processing tax. In other words, we are asked, by construction, to afford the plaintiff protection against a contingency other than that which the parties themselves provided.

"Defendant contends that there can be no implied contract where there is an express contract between the parties relating to the same subject matter, and omissions in a written contract can not be supplied by implications unless the implication results from the language employed in the instrument or is indispensable to carry the intention of the parties into effect. Many authorities are cited in support of this contention."

* * * * * * *

"In Robinson *v.* Bowe, 8 Cir., 73 F. (2d) 238, on page 241, it is said: 'In construing a written contract, the court will carry out as far as possible the intention

of the parties, *but is bound by the intention as disclosed by the instrument executed between them.* Albien *v.* Smith, 24 S. D. 203, 123 N. W. 675; Wilson *v.* Lewis, 63 Neb. 617, 88 N. W. 690; Patnott *v.* Simpson & Co., (C. C. A.) 35 F. (2d) 840. *The courts may not add to a contract that which it does not contain nor add thereto that which subsequent events develop would have been advantageous to one of the parties.*"

* * * * * * *

"Other authorities could be quoted to the same effect. It seems clear to us that the law is well settled that where parties expressly contract, under what circumstances an obligation may arise with reference to a certain subject matter, where the same is entered into without fraud or mutual mistake, it excludes the possibility of an implied covenant of a contradictory or different nature. In the instant case, the alleged implied covenant, of course, is not contradictory to those expressly made, but it certainly is different and in addition thereto. There is no claim of fraud or mutual mistake; the parties were dealing at arms' length, and so far as is shown, there was no effort or intention on the part of either to prevent the other from incorporating any provision necessary for the protection of the contracting parties. *If the parties had desired or intended to provide for the contingency here presented, they could, and, no doubt, would have done so. Generalia specialibus non derogant.*" (Emphasis supplied.)

The law of the State of Washington has been stated by its Supreme Court in *McBride* v. *Callahan,* 173 Wash. 609, 24 Pac. (2d) 105, and *Book* v. *Thomas,* 61 Wash. 607, 112 Pac. 917. It is to the same general effect as the foregoing cases.

The court below has chosen to ignore these well accepted canons of contract interpretation. Not only have these principles been ignored, but a directly opposite doctrine has been stated, with no attempt to cite any authority in

support thereof. The court has said that, where the condition which might possibly affect performance is known to the parties and provision could easily have been made against it but the parties have not done so, the court will insert it for them in an otherwise clear and unambiguous agreement. Such a principle of contract construction is at variance with all other reported cases and certainly would be productive of chaos in contractual relationships were it to become the law.

It is obvious from the many paragraphs of discussion in the opinion devoted to the matter that the court below was influenced in its interpretation of the Truce Agreement by the completely incorrect assumption of fact that the International Longshoremen's Association as an international organization had seceded from the American Federation of Labor, and that the A. F. of L. Convention was deciding a dispute between two organizations, one of which was affiliated with a rival group. Further, the court seemed to be under the impression that the Convention was deciding only the particular local dispute involving the five warehouses. Neither of these assumptions are correct, and neither of them were found or contended to be true by the Board in its decision or in its brief. The statements in the decision below respecting the unfairness of submitting a dispute to the A. F. of L. Convention for settlement when one of the contending parties was affiliated with a rival organization, and the lack of power and authority on the part of the Convention, under the A. F. of L. constitution, to attempt to settle such a controversy, are completely irrelevant to this case, because the uncontroverted fact is that the International Longshoremen's Association never did leave the American Federation of Labor—only some of its West Coast locals did so—and that the A. F. of L. Convention did decide the dispute between two strong international unions, both affiliated with it and both contending for jurisdiction. Further, the Convention was not deciding

merely a local controversy involving the five warehouses, but was deciding a national controversy involving jurisdiction to organize throughout the entire United States.

The court below further sustains its interpretation of the Truce Agreement by reference to an extraneous document submitted for signature to the employees at the other three of the five warehouses, but not submitted for signature and not known to the employees at the two warehouses in question. This document, obviously designed to clarify the Truce Agreement and to establish the intent of the parties in the event of secession beyond any shadow of doubt, stated that in the event of secession the employees would, nevertheless, abide by the decision of the Convention. It was not submitted to the employees of the two warehouses in question through inadvertence, and these employees had no knowledge of it whatsover (R. 507-508). Likewise, the employer had no knowledge of this supplemental agreement. How this agreement could be indicative of the intent of persons who had no knowledge of it the court below does not attempt to explain. So far as indicating the intent of the Teamsters is concerned, the supplemental agreement would more reasonably indicate an intent that the parties be bound regardless of secession, rather than that the parties did not intend to be bound in the event of secession, for, certainly, requiring this agreement was only a means of making doubly certain that that object was to be obtained. The court does not attempt to explain why the Teamsters should intend compliance with the agreement, regardless of secession, with respect to the employees at three of the warehouses and should not intend it at the two others; and surely, the intent to be bound by the decision in all events is more consistent with the underlying desire of the parties to finally and permanently end the long-drawn-out controversy. Reliance by the court below on the supplemental agreement, not submitted or known to the individual employees or to the employer, in support of its

finding of the intent of these employees not only violates all principles of contract law but is in violation of common sense.

Assuming we are permitted to go outside the provisions of the Truce Agreement itself, which, in view of its lack of ambiguity, we probably are not, there is other very compelling evidence in the record respecting the intent of the parties which the court below has disregarded.

That Local Union 38-117 of the I. L. A. and its members, signatories of the Truce Agreement, intended to abide by the provisions of that agreement and the decision of the convention of the American Federation of Labor at the time of entering into the agreement is clearly established by the testimony of Bradshaw, the Board's chief witness, at page 273 of the record:

> "Q. And when you made those proposals did you intend and did the union intend to abide by the decision of the convention?
>
> "A. At that time we were in the A. F. of L. We are not in the A. F. of L. now.
>
> * * * * * * *
>
> "Q. Then you did intend to abide by the decision.
>
> "A. That is right."

(See also Bradshaw's testimony on pages 279 and 280 of the record.)

It is clearly established that the company intended the agreement to be binding in all events, for otherwise it would never have reopened the two warehouses involved in these proceedings. As stated by Mr. Gertridge, McKesson & Robbins' manager of the Stewart-Holmes Division (R. 398):

> "Q. * * * did you understand this (Truce Agreement) to be a final settlement of this jurisdictional dispute?
>
> "A. I certainly did.

"Q. Would your firm have considered reopening its plant at that time if it had not been so considered?

"A. We would not have opened our plant."

And that it was the intention of the Teamsters' union that the Truce Agreement should be binding, even if the I. L. A. might subsequently withdraw from the American Federation of Labor, is established by the insistence of Beck, the Teamsters' representative, that a supplemental agreement be signed emphasizing this intent (R. 380-381).

Finally, that the Citizens Committee which drafted the Truce Agreement intended it to be binding on the parties without reservation is established by the letter of the Committee (signed by E. B. Fish) to the company, announcing the decision of the A. F. of L. convention and expressing gratification that the labor difficulties of the company had been terminated (R. 176-178).

Surely, the foregoing, especially in the absence of the testimony of one witness to the effect that it was the expressed intention of the parties that the terms of the Truce Agreement would not be binding in the event of the severance of affiliation of any party from the American Federation of Labor, establishes the intentions of the parties at the time the Truce Agreement was consummated.

It is submitted that the court below has so far departed from applicable principles of the law of contract construction as decided by this Court, by the Federal circuit courts, and by the Washington Supreme Court as to warrant and require this Court to intervene.

III.

There is no evidence and no policy of the Act to support the Board's order forbidding the employer from dealing with the Teamsters as the representative of "any" of its employees.

There is no evidence and no finding offering any basis for the Board's order requiring the employer to refrain from dealing with or recognizing the Teamsters' union as the representative of *any* of its employees at the two warehouses in question. Even the evidence submitted by the C. I. O. did not attempt to show that the C. I. O. represented all of the employees at the two warehouses in question, and the Board did not find that the C. I. O. was entitled to be the exclusive bargaining agent as the representative of the majority. The Board specifically found that the Teamsters' union represented at least some of the employees at the two warehouses in question on November 15th (R. 519). Further, the Board makes the specific finding in the Representation proceeding that "there is doubt" as to the desire of the employees at each of the five warehouses. (5 N. L. R. B. 70, at page 85.) Finally, the only unfair practice with which the employer was charged or concerning which it was convicted was that it had made an exclusive closed-shop contract covering all of the employees with an organization that represented only a minority.

Accordingly, the Board's order denying the Teamsters the right to represent any of its members at the two warehouses in question is in complete disregard of (1) the Board's own findings in both the representation and complaint cases, (2) the results of the election, (3) the fact that the only unfair practice of the employer was in dealing with a minority group, (4) the fact that there is no evidence and no finding that the employer assisted the Teamsters in obtaining all of its members, (5) the fact that

no other organization was certified as exclusive representative for all of the employees.

Certainly, no policy of the Act requires that an accredited labor organization, not company dominated or maintained, refrain, under the circumstances in this case, from dealing with the employer for those employees who are members of that organization. Unless the facts show and the Board finds that the employer assisted the organization by unfair practices to obtain *all* of its members, we cannot imagine, nor has the Board suggested, any policy of the Act that would be effectuated by the present order denying the Teamsters or those employees who are members of the Teamsters any and all rights at the warehouses in question.

This Court has characterized a very similar attempted assertion of power by the Board as punitive in the case of *Consolidated Edison Company* v. *National Labor Relations Board,* 59 Sup. Ct. 206. The following language of that case is directly applicable to the present order denying the Teamsters the right to represent any of its members:

> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brother-

hood the collective bargaining agency for those employees who are its members."

• • • • • • •

"Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers. The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption. The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice."

• • • • • • •

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."

It is obvious that the Board's order requiring the employer to refrain "from dealing in any manner" with the Teamsters is directly contrary to the holding of this Court.

Conclusion.

It is submitted that the decree herein of the United States Court of Appeals for the District of Columbia is in error and should be reversed, and it is respectfully urged that the Court grant the writ of certiorari petitioner seeks herein.

Respectfully submitted,

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Dated this 19th day of September, 1941.

APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

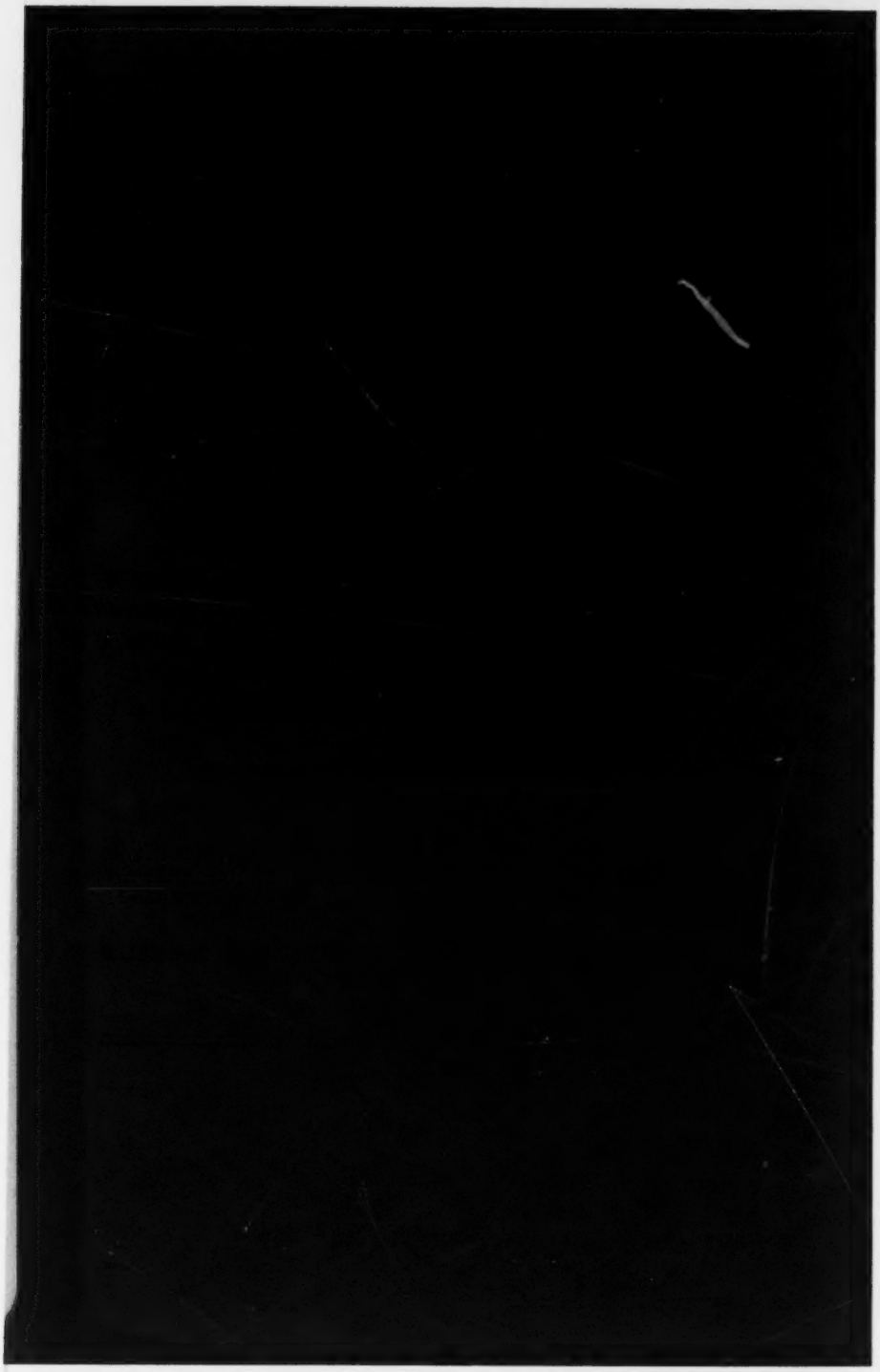
(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * * *

SEC. 9 (c). Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.



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421129—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 627

WAREHOUSEMEN'S UNION, LOCAL 117, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 543–559) are reported in 121 F. (2d) 84. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 497–530) are reported in 19 N. L. R. B. 778.

JURISDICTION

The decree of the court below (R. 560–562) was entered on May 5, 1941.[1] A petition for rehearing filed by petitioner (R. 566–584) was denied on June 21, 1941 (R. 598). The petition for a writ of certiorari was filed on September 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board's action in directing and holding an election in proceedings under Section 9 of the Act barred it from prosecuting unfair labor practice charges under Section 10.

2. Whether the Board's finding that a so-called Truce Agreement did not apply in the event one of the parties seceded from the American Federation of Labor is proper.

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[1] The decree was entered in a proceeding instituted under Section 10 (f) of the National Labor Relations Act by petitioner, a labor organization aggrieved by the Board's order, to review and set aside said order (R. 1–13). A separate decree to like effect (R. 563–565) was entered by the court below at the same time in a cross-proceeding instituted by the Board under Section 10 (e) of the Act against McKesson & Robbins, Inc., for enforcement of the Board's order against the latter (R. 14–18). A companion petition for a writ of certiorari to review the latter decree has been filed as No. 628, this Term, by McKesson & Robbins, Inc.

3. A further question urged by petitioner, but which we think is not properly presented in this case, is whether the Board's order restraining exclusive recognition of an organization illegally recognized and granted a closed-shop contract is proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (July 5, 1935, 49 Stat. 449, 5 U. S. C. Supp. V, Sec. 150, et seq.) are set forth in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 497–530). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

Late in 1936, a "jurisdictional" dispute arose between petitioner (herein sometimes called the Teamsters), and Weighers, Warehousemen, and Cereal Workers, Local 38–117, International Longshoremen's Association (herein called the Longshoremen), both of which were then affiliated with the American Federation of Labor, concerning the right to organize, among others, the employees at two Seattle warehouses of McKesson & Robbins, Inc. (herein called McKesson) (R. 504–505; 243–

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

244, 396).[3] As a result of the controversy, these warehouses were closed from January 7 to June 14, 1937, when they reopened following the signing by the rival unions, at the instance of a Citizens' Committee, of an agreement (herein called the Truce Agreement) (R. 505–506; 396–397), and the signing by the individual employees of an attached statement in which they approved and agreed to be bound by the Truce Agreement (R. 508; 11–12, 31, 278–279, 397, 438).

In substance, the Truce Agreement, after reciting its purpose to settle the jurisdictional dispute, provided that the employees would return to work under their then union affiliations; that the Longshoremen would appeal to the October convention of the A. F. of L. from an adverse decision of the A. F. of L. Executive Council, rendered in February 1937, with respect to the jurisdictional dispute; and that both unions would be bound by the decision of the convention (R. 506; 10–12, 436–437). The Teamsters also proposed that the employees enter into a "supplemental" agreement providing that if the Longshoremen seceded from the A. F. of L., as they were then contemplating (R. 508; 252–253), the employees would nevertheless obey the jurisdictional decision of the A. F. of

[3] One of the warehouses was then owned by another company whose assets McKesson thereafter purchased on October 1, 1937 (R. 509). This fact does not bear on the merits of the case, and for convenience we refer to both warehouses as owned by McKesson.

L. convention and would apply for membership in the Teamsters if it won the decision (R. 507–508; 382–383, 439). This supplemental agreement, however, seemingly through accident, was never submitted to the McKesson employees and was not signed by them (R. 518; 386, 278–279).

In August 1937 the Longshoremen withdrew from the A. F. of L. and affiliated with the C. I. O.[4] On September 27, as a C. I. O. affiliate, the Longshoremen advised McKesson that it was the designated representative of a majority of McKesson's employees and requested bargaining rights (R. 508–509; 152–153, 178–179, 319–320). On October 13 the A. F. of L. convention ruled that the Teamsters had jurisdiction over warehouse employees (R. 509; 323). On October 27 McKesson and the Teamsters notified the McKesson employees that they were required to join the Teamsters (R. 509, 515; 141–142, 179–180, 340). The next day the Longshoremen filed with the Board petitions under Section 9 of the Act alleging the existence of questions concerning representation, and requesting an

[4] The change in affiliation was effected in the following manner: After securing approval in a referendum among the membership of the various locals (including Local 38–117 here involved) of the Pacific Coast District of the International Longshoremen's Association, the officers of the Pacific Coast District procured a charter from the C. I. O. for a new union styled The International Longshoremen and Warehousemen's Union, which in turn chartered Local 9, District 1, in succession to Local 38–117 (R. 508, 504; 252–254, 373–374).

investigation and certification of bargaining representatives (R. 510; 153; 5 N. L. R. B. 70).

Despite knowledge of the filing of the Section 9 petitions (R. 510; 153), McKesson, on November 15, entered into closed-shop contracts with the Teamsters and demanded that all its employees join that union (R. 510–511, 515–516; 12, 49–50, 60, 115–116, 151, 186–187, 235–236, 341–342). At that time 44 out of a total of 59 McKesson employees were members of the Longshoremen (R. 519–520; 231–232, 284–287, 308–310, 311–312, 54–55). A large majority of the employees refused to join the Teamsters (R. 511–513, 520; 54–56, 98, 342–343, 47–48, 50–51, 303–304, 314–315, 325–328, 402–403), whereupon McKesson, because of such refusal, discharged 17 of them (R. 513–514, 516–517, 522–523; Pet. 5–6, R. 38–40, 44, 47–48, 52–53, 140–142, 299, 316). On November 23, 1937, the Longshoremen filed charges of unfair labor practices with the Board's Regional Director based upon the discharges (R. 498).

On February 4, 1938, the Board at Washington, D. C., uninformed of the pendency of the charges of unfair labor practices (R. 521), issued an interlocutory decision in the representation case, in which it ruled that the Truce Agreement was intended merely to adjust a dispute between unions affiliated with the A. F. of L., that it was not intended to apply to a case where one of the unions left the A. F. of L., and that the closed-shop agreements did not constitute a bar to the proceedings.

It directed that an election be held in which persons employed on October 28, 1937, the date the representation petitions were filed, would be eligible to vote (R. 514; 5 N. L. R. B. 70). The election was held on February 18, 1938; the Teamsters received 32 votes and the Longshoremen 27 votes (R. 514; 198–202). The Board, however, issued no certification and took no further action in the representation proceedings because, after the election had been directed, the unfair labor practice charges which had been filed came to its attention (R. 514, 521).

The Board issued its complaint in the present case in July 1938, and after a hearing in September 1938, issued the order now in question (R. 498, 500, 527–530). The essential issue in the case was the validity of the closed-shop agreements pursuant to which the 17 employees were discharged; under the proviso to Section 8 (3) of the Act, (*infra,* p. 18), their validity depended upon whether the Teamsters represented a majority of the employees when the agreements were made on November 15, 1937.[5] Neither the Teamsters nor McKesson challenged the direct evidence, above noted (*supra,* p. 6), that a majority of the employees belonged to the Longshoremen on Novem-

[5] It was, of course, also a prerequisite to validity of the agreements under the Section 8 (3) proviso that petitioner be "not established, maintained, or assisted" by any unfair labor practice; however, the Board did not put in issue petitioner's compliance with this condition.

ber 15; they contended, however, that the Teamsters' majority status on that day was established (a) by the Truce Agreement and (b) by the representation election in February 1938. They contended further that the representation proceedings were a bar to prosecution of the unfair labor practice case.

The Board found, as it had in the representation proceedings (*supra,* p. 6), that the Truce Agreement was intended merely to adjust a jurisdictional dispute between organizations affiliated with the A. F. of L.; that the parties did not intend it to be binding upon the employees in case one of the parties seceded from the A. F. of L.; and that, therefore, the Truce Agreement did not constitute an agreement to designate, or a designation of, the Teamsters as majority representative on November 15, 1937 (R. 518). It also found that the February 1938 election could not be regarded as establishing the Teamsters' majority status on November 15, 1937, particularly since the employees' free choice had been restricted in the interim by the coercive discharges under the closed-shop agreements (R. 521). The Board held, finally, that its maintenance, inadvertently, of the representation proceedings while unfair labor charges were pending did not bar it from prosecuting the latter (R. 521). The Board concluded that petitioner did not represent a majority of the employees on November 15, 1937 (R.

519); that the closed-shop agreements were invalid (R. 522); and that the discharges pursuant thereto violated Section 8 (1) and (3) of the Act (R. 522–523, 527).

The Board's order required McKesson to cease and desist from its unfair labor practices and from giving effect to the closed-shop contracts; to reinstate the employees against whom it had discriminated; and to post notices (R. 527–529).[6]

On April 1, 1940, the Teamsters filed in the court below a petition to review and set aside the Board's order (R. 1–12). The Board answered, requesting enforcement of its order against McKesson (R. 13–18). On May 5, 1941, the court, Groner, C. J., dissenting, handed down its opinion (R. 543–559) and entered its decree (R. 560–562) enforcing the Board's order except for minor modifications not here material.[7] A petition for rehearing filed by petitioner (R. 566–584) was denied on June 21, 1941 (R. 598).

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[6] Because McKesson in discharging the men appeared to have acted in honest, though erroneous, reliance on the Truce Agreement, the Board in the exercise of its discretion eliminated all back pay up to the date of its order, directing instead that back pay should run only from and in the event of a refusal to comply with the reinstatement order (R. 526, 529).

[7] The court set aside the "work relief" provision in accordance with *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, and set aside a provision requiring McKesson generally to cease and desist from interference with the rights guaranteed employees in Section 7 of the Act (R. 556–557).

ARGUMENT

1. Petitioner contends (Pet. 8, 9, 13, 14–21) that the Board acted arbitrarily and beyond its power in suspending further proceedings in the representation case after the holding of the election, and that the representation proceeding necessarily constituted a bar to the proceeding in the unfair practice case. The contention is without merit. McKesson's unfair labor practices, including the question of the validity of the closed-shop contracts with petitioner, were not in issue in the representation proceeding. The purpose, procedure, issues, and effect of a representation case under Section 9 of the Act are wholly different from those of an unfair labor practice case under Section 10. The former involves only a fact-finding inquiry into the identity of representatives for subsequent collective bargaining; the latter seeks to remedy unfair labor practices if found to have been committed, and to prevent their repetition. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 405, 409. There is nothing in the Act which prescribes the order in which proceedings under Sections 9 and 10, respectively, must be conducted, or which requires the Board to delay an election in a representation case pending a hearing in an unfair labor practice case involving the same employer.

While the issue in the unfair labor practice case depended on whether petitioner represented a ma-

jority of the employees when the closed-shop agreements were made on November 15, 1937, neither the Board's action in ordering an election in February 1938, nor the results of that election, determined the question. Obviously ordering an election does not determine the majority status of a union participating in the election; that is the very purpose of the election. Likewise, the results of the election in February 1938 in the representation case could not determine the desires of the employees with respect to representation on November 15, 1937, the crucial date in the unfair labor practice case. This is particularly true where, as here, unfair labor practices intervened between the two dates, for it is settled that an election held while unfair labor practices remain unremedied cannot normally be taken to reflect the uncoerced will of the employees. *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 82–83, affirming 110 F. (2d) 29, 33 (App. D. C.); *National Labor Relations Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318, 339–340; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461.

There was nothing arbitrary in the Board's exercise of its authority. Petitioner's contention in this regard presupposes a power in the federal courts to pass upon matters pertaining to proceedings under Section 9 (c) in circumstances other than the exceptional situation covered by

Section 9 (d);[8] the Act, however, denies such power. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458–459; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 405–406. But even if such power existed, there would be no warrant for its exercise. No prejudice to petitioner or McKesson resulted from the Board's action, since they entered into the closed-shop contracts before the election was either ordered or held. Certainly the holding of the election may not be said to have dissipated the effects of any unfair labor practices which might have been committed, thus rendering prosecution of the unfair labor practice case unnecessary; to the contrary, since the election took place while previous unfair labor practices remained unremedied, the election must be deemed to have been affected by the unfair labor practices, not *vice versa*. The Board having become aware, subsequent to directing the election, of the existence of the unfair labor practice charges, its action in investigating the charges and restraining the violations found was clearly proper and within its statutory authority (Section 10 (a), (b), (c)).

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[8] Section 9 (d) limits court review of Section 9 proceedings to cases in which the Board has issued an order under Section 10 (c) "based in whole or in part upon facts certified following an investigation pursuant to" Section 9 (c). Here, however, the Board issued no certification following its investigation pursuant to Section 9 (c) (*supra*, p. 7).

2. Petitioner urges (Pet. 8, 10, 13–14, 21–31) that there is no record support for the Board's finding that the Truce Agreement was not intended by the parties to apply in the event one of the parties left the A. F. of L. (R. 518). The court below sustained the finding (R. 546–552), and there is obviously no occasion for review of the issue by this Court. Cf. *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461. Moreover, since the Truce Agreement is a unique contract, the question of its proper interpretation is not one of general importance.

In any case, the concurrent findings below are adequately supported in the record. The express purpose of the agreement was to adjust a "jurisdictional" dispute and it provides for an "appeal" by the Longshoremen to the A. F. of L. convention (R. 436). It cannot be supposed that the parties intended to have the A. F. of L. remain as judge in a controversy between one of its affiliates and a union which had become affiliated with the C. I. O. Furthermore, petitioner's unsuccessful effort to secure a "supplemental" agreement to cover the contingency of the Longshoremen's withdrawal from the A. F. of L. (*supra,* p. 4) is in itself significant proof that the agreement as signed was not to apply in such event (see R. 551–552).

The cases cited by petitioner (Pet. 10, 25–27) are not in conflict. They merely enunciate the

general principle that where performance of a contract may be rendered impossible by a condition which the parties know may occur and against which they make no provision, performance is not excused by the occurrence of the condition. In this case, however, the question is not of excusing performance upon the occurrence of a condition rendering performance impossible, but of ascertaining the nature of the obligation assumed by the parties in the first instance.

Moreover, petitioner's contention concerning the applicability of the Truce Agreement despite secession from the A. F. of L. is inconclusive even if true. Although the Board did not pass upon the question, we think it reasonably clear that, by agreeing to be "bound" by the Truce Agreement (R. 508), the employees did not agree to designate petitioner as their collective bargaining agency if it won the convention decision, but only that petitioner would have sole jurisdiction as against the Longshoremen to carry on organizational activities. Consequently the Truce Agreement, even if applicable, cannot establish petitioner's majority status when it entered into the closed-shop agreements on November 15, 1937.

3. Petitioner attacks (Pet. 8–9, 10–11, 14, 32–34) paragraph 1 (c) of the Board's order (R. 528) upon the assertion that it improperly bars recognition of petitioner as the representative of "any"

of McKesson's employees. But the issue is not properly presented in this case. Petitioner raised no question in the court below concerning the provision; it was not challenged either in the petition for review (R. 1–9) or in petitioner's brief. The court below made no mention of the provision in its discussion of the Board's order (R. 543–544, 556–557) and petitioner's petition for rehearing wholly ignored the point (R. 566–584). This Court has on numerous recent occasions indicated that under such circumstances it does not regard questions of the validity of particular provisions of Board orders as properly raised. *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board,* certiorari denied, No. 862, last Term; *Viking Pump Co.* v. *National Labor Relations Board,* certiorari denied, 312 U. S. 680; *J. Greenebaum Tanning Co.* v. *National Labor Relations Board,* certiorari denied, 311 U. S. 662; *Subin* v. *National Labor Relations Board,* certiorari denied, 311 U. S. 673.

In any event, petitioner's challenge misconstrues the meaning of paragraph 1 (c). That paragraph requires McKesson to cease and desist from (R. 528):

> Recognizing or in any manner dealing with said Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of

> America, as the exclusive collective bargaining representative of any of its warehouse employees, unless and until said labor organization is certified as such exclusive representative by the Board.

The provision does not bar petitioner either from present recognition as representative of "any" employees or from "the right to represent any of its members" (Pet. 32). To the contrary, the provision bars recognition of petitioner only as "exclusive" (i. e., as majority) representative until such time as it is certified as such by the Board in proceedings under Section 9. Petitioner does not dispute that, given this meaning, the provision is addressed to the precise unfair labor practice in which McKesson was found to have engaged. Under the Act, such a provision is not only appropriate but mandatory. Section 10 (e); *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265.[9]

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[9] To allay any concern which petitioner may have concerning the proper interpretation of the provision (though the Board perceives no ambiguity), the Board hereby undertakes that, for the purpose of any further proceedings in the court below on contempt or otherwise, the provision shall have the meaning above ascribed. Petitioner's claim of conflict with *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (Pet. 10, 33–34) disappears, of course, with the proper reading of the provision.

CONCLUSION

This is a unique case, turning upon its own particular facts. The decision below is correct and involves no conflict. The petition should, therefore, be denied.

Respectfully submitted.

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OCTOBER 1941.

APPENDIX

The pertinent provisions of the National Labor Relations Act (July 5, 1935, 49 Stat. 449, 5 U. S. C. Supp. V, Sec. 150 et seq.) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the

representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

SEC. 9. (c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (in-

cluding the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional

evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the

order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-674

No. 628

McKESSON & ROBBINS, INC., McKESSON-STEWART-HOLMES DRUG, AND BLUMAUER FRANK DRUG, DIVISIONS,

Petitioner,

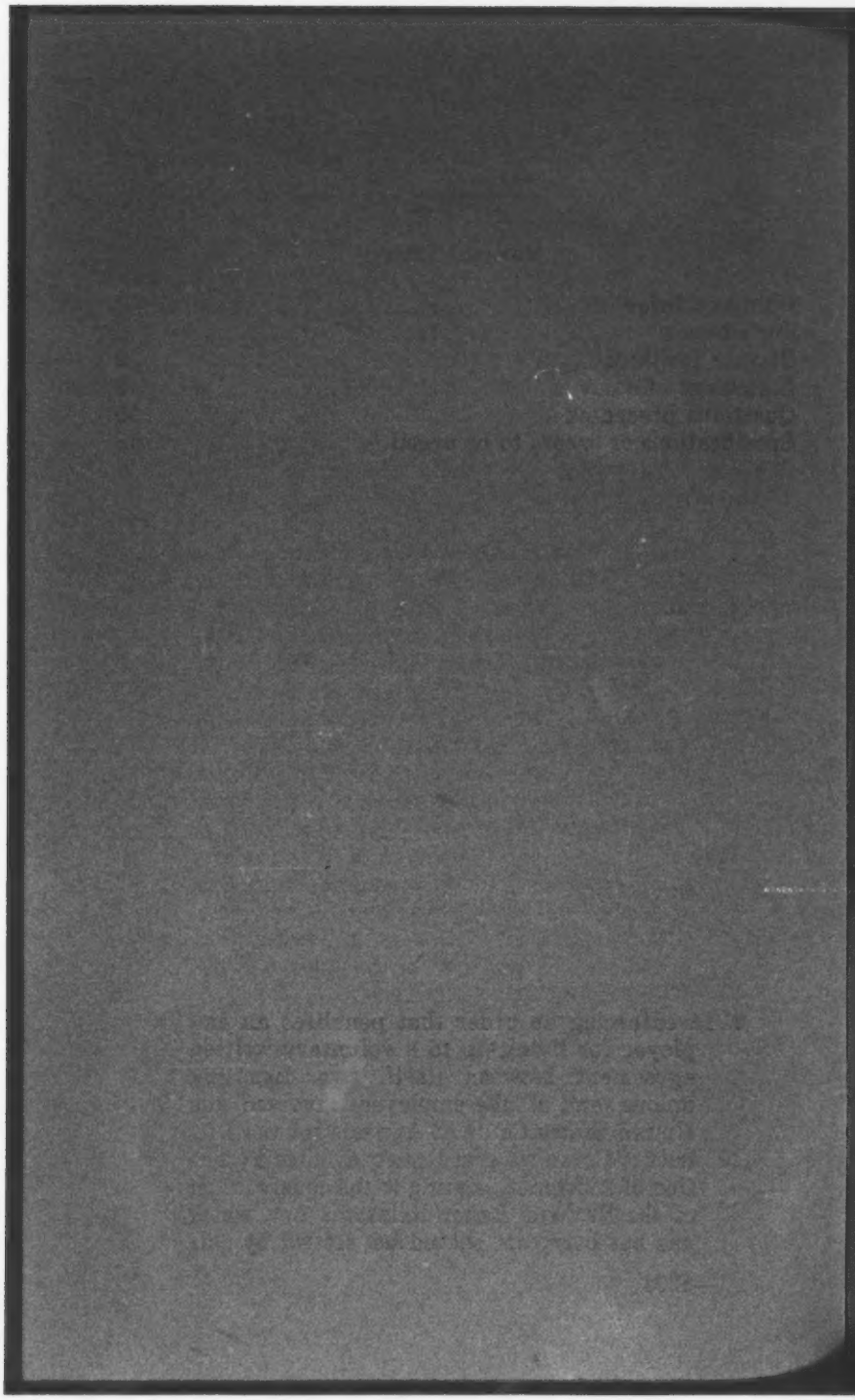
against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

CLINTON ROBB,
FREDERIC WINGERSKY,
AARON J. BRONSTEIN,
Attorneys for Petitioner.



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1. In invalidating individual agreements entered into by employees, with the consent of their unions, designed to settle a jurisdictional controversy between their unions, the United States Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this Court. Further, said court has failed to give proper effect to the decision of this Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1, 57 Supreme Court 615, to the effect that the National Labor Relations Act does not prevent individual contracts with employees not designed to forestall or limit union activities	21
2. In enforcing an order that penalizes an employer for living up to a voluntary written agreement between itself, two disputing unions and all the employees involved, the United States Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this	

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Court. Further, such enforcement has the direct effect of defeating the principal purposes of the Act, which was "To avoid industrial strife by providing an orderly process of settling controversies." 28

3. In upholding the order of the Board herein the United States Court of Appeals for the District of Columbia has sanctioned such an arbitrary and unlawful exercise of power on the part of, and course of procedure by, the Board, as to call for an exercise of this Court's power of supervision 30

4. In holding the closed-shop agreements of November 15, 1937, invalid, and the actions taken thereunder as unfair labor practices, the decision of the United States Court of Appeals of the District of Columbia is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.* (June 6, 1941), 120 F. (2d) 611, and the decision of the United States Court of Appeals for the Fifth Circuit in *Peninsular & Occidental Steamship Company* v. *N. L. R. B., et al.*, 98 F. (2d) 411, Cert. Den. 305 U. S. 653, 59 Supreme Court 248 36

5. In holding the discharges herein improper, the United States Court of Appeals for the District of Columbia has failed to give proper effect to the decision of this Court in *N. L. R. B.* v. *The Sands Mfg. Co.* (1939), 306 U. S. 332, 59 Supreme Court 508 44

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

McKESSON & ROBBINS, INC., McKESSON-STEWART-HOLMES DRUG, AND BLUMAUER FRANK DRUG, DIVISIONS,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

McKesson & Robbins, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia rendered on May 5, 1941 (R. 563), denying the petition of Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, affiliated with the American Federa-

tion of Labor, to set aside a certain order of the National Labor Relations Board made on January 23, 1940, and granting to said Board its petition to enforce said order against the petitioner.

Opinions Below.

The findings of fact, conclusions of law, and order of the Board are printed on pages 497-530 of the record, and are reported as 19 N. L. R. B. 778. The opinion of the United States Court of Appeals for the District of Columbia will be found in 121 F. (2d) 84 (Adv. Sheets). It will also be found on pages 543-559 of the record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347), Section 10 (e) of the National Labor Relations Act (29 U. S. C. A., Section 160 (e)), and under General Rule 38 of this Court, Section 5, Subdivision c.

Statute Involved.

The statute involved is the National Labor Relations Act, 29 U. S. C. A., Section 151, *et seq.* The pertinent provisions of the Act are Sections 2 (6) and (7), 7, 8 (1) and (3), and 10 (e) and (f). Because of the length of these provisions they are set forth in an appendix.

Statement of Facts.

1. The petitioner, McKesson & Robbins, Inc., hereinafter called "McKesson", is a corporation organized under and by virtue of the laws of the State of Maryland, with a principal place of business at 155 East 44th Street, New York, New York. It owns and operates a large number of whole-

sale warehouses in different localities in the United States, each warehouse being called a division and being under local management (R. 503). Included among such warehouses is one in Seattle, Washington, called the McKesson-Stewart-Holmes Drug Division, hereinafter called "McKesson-Stewart". On or about October 1, 1937, McKesson purchased the Seattle warehouse and assets of the Blumauer Frank Drug Co., and for a short time thereafter operated the said Seattle warehouse as its Blumauer-Frank Drug Division, sometimes hereinafter called "Blumauer Frank". It discontinued the operations of Blumauer Frank on or about November 17, 1937 (R. 503).

On December 8, 1938, subsequent to the hearings hereinafter referred to before the National Labor Relations Board, hereinafter called the "Board", which hearings were held on September 19-22, inclusive, 1938, but before the issuance of the Board's order herein, the United States District Court for the Southern District of New York, upon petition by McKesson for reorganization under Chapter X of the Bankruptcy Act (52 Stat. 840, 11 U. S. C. (Supp. V), Sec. 501), issued an order appointing William J. Wardall Trustee of the Estate and all the assets of McKesson, and staying all suits and proceedings against McKesson pending final decree in the reorganization proceedings. The Board ruled that the proceedings herein were not affected by the District Court's restraining order, and none of the parties have questioned the Board's ruling in this respect. On July 1, 1941, reorganization proceedings having been completed, and pursuant to due approval thereof by the District Court, McKesson was revested in its estate and assets.

2. International Longshoremen & Warehousemen's Union, Local 9, District 1, hereinafter called "Local No. 9", is a labor organization presently affiliated with the Congress of Industrial Organizations, hereinafter called the "C. I. O.". It admits to its membership all employees of McKesson-

Stewart engaged in work in and about the warehouse (R. 503-4). Local No. 9 was formed in June, 1937, by the officers and certain members of Weighers, Warehousemen & Cereal Workers, Local 38-117, of the International Longshoremen's Association, hereinafter called "Longshoremen", when certain Pacific Coast locals of such Association gave up their affiliation with the American Federation of Labor, hereinafter called the "A. F. of L." and became affiliated with the C. I. O. (R. 504).

3. Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, hereinafter called "Teamsters", is a labor organization chartered by the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, which is affiliated with the A. F. of L. It too admits to its membership all employees of McKesson-Stewart engaged in work in and about the warehouse (R. 504). It was formed in October or November, 1936 (R. 504).

4. In October, 1936, Longshoremen represented a large number of employees in both McKesson-Stewart and the Seattle plant of Blumauer Frank Drug Co. (R. 240-1, 504), and on December 29, 1936, the Managements of the two plants agreed with it upon a statement of policies governing their labor relations (R. 504). Around this time, however, Teamsters were making efforts to organize these same employees (R. 243-4, 396, 505), and in order to persuade these employees to join it, it picketed the plants and prevented their trucks from running (R. 504). As a result, the two plants closed on January 7, 1937, and remained closed until June 9, 1937, when the so-called "Truce Agreement", hereinafter referred to, was entered into. In February, 1937, the Executive Council of the A. F. of L. extended the jurisdiction of Teamsters so as to cover persons employed in warehouses away from the marine docks and actual waterfront (R. 505).

5. This jurisdictional controversy between the Teamsters and the Longshoremen also involved three other Seattle warehouses, the plants of the West Coast Wholesale Drug Co., the West Coast Kalsomine Co., and the Bemis Bag Co., where events took approximately the same course as noted above (R. 505).

6. Between the dates of January 7, 1937, and June 9, 1937, various attempts were made to negotiate a settlement of the controversy between the two unions, and a Citizens' Committee, composed of business and professional men of Seattle, was formed to aid in the negotiations. It finally was successful in negotiating, on June 9, 1937, what is herein called the "Truce Agreement", providing (1) that the five plants would reopen under guarantees by both unions that the workers would be permitted to return to work, and the plants' products hauled and delivered without interference, (2) that the employees would return to work under their then union affiliations, and that Longshoremen would appeal from the aforesaid February decision of the Executive Council of the A. F. of L. extending Teamsters' jurisdiction to the October convention of the A. F. of L. to be held in Denver, Colorado, (3) that both unions agreed to be bound by the final decision of said convention, (4) that if Longshoremen did not so appeal, both unions agreed to abide by the decision of the Executive Council, and (5) that the Truce Agreement would become effective when signed by the officers of the unions, and that the signing of the Truce Agreement by the employees would entitle each one signing to the same position which he had held before the plant in which he worked had ceased operations. A copy of the Truce Agreement appears in the record at pages 173-4.

7. Pursuant to paragraph numbered 1 of the Truce Agreement, McKesson opened its McKesson-Stewart Division at

great expense to itself (R. 398). McKesson did not sign such Agreement, but did agree to be bound by it (R. 397). Pursuant to paragraph numbered 5 of such Agreement the employees at both McKesson-Stewart and the Seattle warehouse of the Blumauer Frank Drug Co. each signed the following statement annexed to a copy of the Truce Agreement:

> "The undersigned employees of (here was inserted the name of the particular company) fully understanding the within agreement, hereby approve the same and agree to be bound thereby."

Throughout these proceedings there has been frequent reference made to a so-called "Supplemental Agreement", which was a provision insisted upon by Dave Beck, the International Organizer of the Teamsters' Brotherhood on the West Coast (R. 506), before his name was signed to the Truce Agreement. Said Supplemental Agreement read as follows:

> "Supplementing the foregoing agreement, we do hereby agree that if the International Longshoremen's Association shall sever its connection with the American Federation of Labor, we will nevertheless obey the jurisdictional decision of the American Federation of Labor and if the decision of the Executive Council is not reversed, we will immediately make application for membership in the Teamsters' Union."

and was to be signed by the unions and individual employees.

As to this Supplemental Agreement, it is in issue whether it was agreed to by all parties. However this be, the copies of the Truce Agreement delivered to McKesson and to the Blumauer Frank Drug Company omitted the Supplemental Agreement, presumably by accident (R. 508).

8. When Longshoremen signed the Truce Agreement, there was under serious consideration among certain of its Pacific locals, including the local having jurisdiction of the employees in question, i. e., Local 38-117, the question whether they would sever their A. F. of L. affiliation and affiliate with the C. I. O. (R. 252-3, 273). Such locals made no qualification, exception or provision in the Truce Agreement for this eventuality, the Supplemental Agreement having emanated from Teamsters. It appears further that one of the provisions in one of the Longshoremen's proposals to settle the dispute, preceding the Truce Agreement, provided for a transfer of members between the unions pursuant to final settlement (R. 505-6), and that employees at the other three plants caught with McKesson in the jurisdictional controversy, and which employees were members of Longshoremen, signed the Supplemental Agreement (R. 271).

9. In July 1937 certain Pacific Coast locals of Longshoremen voted to affiliate with the C. I. O., and thereafter the C. I. O. issued a charter to Local No. 9, composed of the officers and those members of the Longshoremen's local having jurisdiction of the employees in question, i. e. Local 38-117, who had voted to withdraw from the A. F. of L. The International Longshoremen's Association has never severed its affiliation with the American Federation of Labor, has participated in all its conventions, and participated in the October 1937 convention when the aforesaid decision of the Executive Council was confirmed. Moreover, not all of the members of the Longshoremen's local having jurisdiction of the employees in question, i.e. Local 38-117, withdrew from the A. F. of L. (R. 109, 136, 508).

10. Despite the terms of the Truce Agreement, about September 27, 1937, Local No. 9 distributed, among the warehouse employees of McKesson-Stewart and the em-

ployees at the Seattle warehouse of Blumauer Frank Drug Co. cards designed to secure their authorizations for Local No. 9 to represent them in collective bargaining and about the same time the Employees' Relations Committee of Local No. 9 at McKesson-Stewart wrote McKesson that it desired to begin bargaining negotiations (R. 508-9).

11. On October 13, 1937, the A. F. of L. Convention in Denver adopted a supplemental report of the Executive Council to the effect that it had extended the jurisdiction of Teamsters to persons employed in warehouses located away from marine docks and the actual waterfronts (R. 509), thus confirming the Executive Council decision aforesaid. On October 27, 1937, McKesson, at the request of Teamsters, delivered to its employees a letter, signed by the Secretary-Treasurer of Teamsters, informing them of such action at the Denver Convention, and stating they would be expected to live up to the terms of the Truce Agreement, including transferring their membership into Teamsters (R. 509). Thereafter, acting in accordance with its understanding of the Truce Agreement which it regarded as obligating it to take such action, on or about November 15, 1937 McKesson signed closed shop agreements with Teamsters for the McKesson-Stewart and Blumauer Frank divisions (R. 510), and put them into effect immediately. The West Coast Wholesale Drug Co. did likewise.

12. On October 28, 1937, subsequent to the A. F. of L. Convention decision and to the notification of the employees thereof, Local No. 9 filed five separate Representation petitions with the Regional Director of the Board for the 18th Region, at Seattle, Washington, alleging that questions had arisen concerning the representation of employees of the five plants, respectively, and requesting investigations and certifications of representatives for the purposes of collective bargaining. In such petitions Local No. 9

claimed practically 100% of the employees in question as members (R. 274). On these petitions, the Board held hearings from November 18 through November 22, 1937, and therein had presented to it, and considered, all of the facts surrounding the execution of the Truce Agreement, and the closed shop contracts and alleged discharges thereunder. The unfair labor practice charges, which initiated these proceedings and which turn only on the making of such closed shop contracts and the alleged discharges thereunder, were first filed on November 23, 1937 (R. 498) and were later sustained upon the very same evidence, the parties indeed having stipulated, for the purposes of these proceedings, that a large portion of the testimony in the Representation hearings be here accepted as testimony herein (R. 223, 239-418).

13. A "Decision and Direction of Elections" in the five Representation proceedings was made by the Board on February 4, 1938, same being 5 N. L. R. B. 70. In said decision the Board found that the closed shop contracts did not constitute a bar to its ordering an election 5 N. L. R. B. 81. Further, the Board ordered an immediate election for the reasons best stated in its own language, namely:

5. N. L. R. B. 85:

"Local No. 9 also introduced in evidence lists of its members employed by each of the companies. A comparison of the names on the membership lists and the names on the lists introduced in evidence of the persons on the pay rolls of the five companies indicates that a majority of the employees in the appropriate unit in each company were members of Local No. 9 as of September 1937.

"*The record, however, indicates that a substantial number of the employees of McKesson-Stewart who were members of Local No. 9 and had signed pledge cards, applied on November 17, 1937, for membership in*

> *the Teamsters' Union.* Although it does not appear clearly, there is evidence indicating that a similar occurrence probably took place among the employees of West Coast Drug. *This indicates the possibility of a change in the desires of the employees in McKesson-Stewart and West Coast Drug concerning representation. Indeed, in view of all the circumstances present in the instant proceedings, we feel that there is doubt as to the present desire of the employees of each of the five companies relative to representation. We find, therefore, that the question which has arisen concerning representation can best be resolved by means of an election by secret ballot.*" (Italics added.)

and the Board made eligible to vote therein only such employees who were on the payroll the week of October 28, 1937, a date prior to the making of the closed shop contracts and any alleged discharges thereunder.

14. Pursuant to such "Decision and Direction of Elections", elections were held with the following results:

a. *Bemis Bag Co.* Of its 155 eligible voters, and from 137 ballots cast, Local No. 9 received 49 votes (5 N. L. R. B. 91-92). As to this Company, Local No. 9's petition was therefore dismissed.

b. *West Coast Kalsomine Co.* Of its 22 eligible voters, and from ballots cast, Local No. 9 received 12 votes and Teamsters 10. Local No. 9 was here certified as bargaining agent (5 N. L. R. B. 92-94).

c. *West Coast Wholesale Drug Co.*, which also executed a closed shop contract with the Teamsters (5 N. L. R. B. 70, 81). Of its 11 eligible voters and ballots cast, Local No. 9 received 6, and Teamsters 5, votes. There was however no certification here, it appearing that on February 26, 1938, all but one of the employees signed a petition revoking any authority theretofore given Local No. 9 and

requesting the Teamsters be declared the sole bargaining agent of the employees, or in the alternative, that the Board order a new election. On February 7, 1939, the Board issued a second "Direction of Elections", among the same employees as before. In this election, Teamsters secured 10, and Local No. 9, 1, votes, whereafter Teamsters was herein certified bargaining agent. The foregoing proceedings appear in 11 N. L. R. B. 40-44.

d. *McKesson-Stewart and the Seattle Warehouse of Blumauer Frank Drug Co.* On February 14, 1938 the Board amended its "Decision and Direction of Elections" of February 4, 1938 (5 N. L. R. B. 88), by ordering but one election to be held among the warehouse employees of both the above noted warehouses. This made for 63 eligible voters, inclusive of approximately 21 Blumauer Frank employees (5 N. L. R. B. 73), of whom 15 join as complainants in the unfair labor charges herein in question and remain members of Local No. 9. Said amendment, however, itself notes the discontinuance of operations at the Blumauer Frank warehouse, and at the time of the hearings herein, there were only about 40 employees engaged in and about McKesson-Stewart's warehouse (R. 503, 515), and the Board has recognized this fact in its order herein, wherein it merely requires these Blumauer Frank employees to be placed upon a preferential list until employment be available.

Of the total of 63 eligible voters so resulting, and from 60 ballots cast, Teamsters received 32, and Local No. 9, 27, votes, and 1 was void. The election was by secret ballot, was conducted in a manner conforming to the directions of the Board, with full opportunity accorded all parties to participate therein and to make challenges, and was certified to by authorized observers for both unions and the Regional Director, acting as agent for the Board in the

matter, as having been fairly and impartially conducted (R. 198-202). Said Regional Director further in his "Intermediate Report upon Secret Ballot", recommended that Teamsters be certified as the exclusive bargaining agency for all the warehouse employees of McKesson's Stewart-Holmes and Blumauer Frank Drug Divisions (R. 201), despite the fact he then had before him the original unamended alleged unfair labor practice charges herein in question, which were filed on November 23, 1937 (R. 209). No action has, however, been taken by the Board on this election or recommendation pending a determination of the issues herein (R. 514).

15. Upon said alleged unfair labor charges, as amended on July 5, 1938, the Board, by its said Regional Director issued two complaints dated July 13, 1938, against McKesson, both alleging, one with respect to the McKesson-Stewart and one with respect to Blumauer Frank, that McKesson had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of sections 8 (1) and (3) and 2(6) and (7) of the National Labor Relations Act, hereinafter called the "Act", with respect to its employees at its said divisions. The complaints are set forth in the record, at pages 203, and 211. As the U. S. Court of Appeals for the District of Columbia recognized, these charges stand or fall upon the sole issue of whether the closed shop contracts of November 15, 1937 were valid. If the contracts stand, the unfair practices found by the Board to have been committed by McKesson, and which were only putting the contracts in effect, were legal.

16. On or about July 28, 1938, McKesson filed an answer to both complaints, in which it admitted the signing of the closed shop agreements, but otherwise denied all the material allegations of the complaints relating to unfair labor

practices. The answer further alleged, among other things, that the closed-shop agreements were executed pursuant to the terms of the Truce Agreement, by the terms of which each and every one of the employees at McKesson-Stewart and Blumauer Frank had agreed to be bound (R. 170).

17. Pursuant to notice, a hearing was held at Seattle, Washington, on September 19, 20, 21 and 22, 1938, before Dwight W. Stephenson, the Trial Examiner duly designated by the Board. At the outset of the hearing and again at the close of the Board's case counsel for McKesson made motions to dismiss the complaints, rulings on which were reserved by the Trial Examiner (R. 161), (R. 500-501). The motions were based on the following grounds (R. 20):

> "first, that, on the record in these cases it appears that McKesson is guilty of no unfair labor practices; second, that the entire controversy has been before the Board, and once decided, and they ordered an election, which was held; and third, that the unions,—the complaining union here, and the other union as well,—and the employees are estopped from pressing these charges of unfair labor practices by their previous actions."

McKesson's argument before the Board was in line with this position.

18. On December 24, 1938 (R. 469), the Trial Examiner filed his "intermediate Report," on these charges, in which he found that McKesson had been guilty of unfair labor practice charges and recommended that an order issue directing reinstatement of the McKesson-Stewart employees with full back pay, and reinstatement, to the extent possible, of Blumauer Frank employees. To the findings of fact, conclusions of law and recommendations in said Report contained, McKesson duly filed exceptions (R. 471) and thereafter argued before the Board such exceptions. On

January 23, 1940 the Board rendered the "Decision and Order" here in question.

19. In said "Decision and Order," the Board disagreed with the Trial Examiner in several important respects. It did, however, order McKesson to reinstate the McKesson-Stewart employees, with back pay only from such date as was five days after McKesson received such "Decision and Order," for the reason that (R. 526) "the legal rights and obligations of the parties under the Truce Agreement and the Labor Relations Schedules (closed shop agreements) have been involved in doubt and the respondent's (McKesson's) course of action with regard to the persons discriminated against appears to have been predicated upon an honest reliance on what it conceived to be the proper interpretation of the Truce Agreement." The Board also ordered the Blumauer Frank employees placed upon a preferential list.

20. In said "Decision and Order," the Board completely ignored the results of the election of February 18, 1938, ordered by it in the Representation proceedings as the best means of resolving the doubt as to the then desires of the employees, despite the fact there was no new evidence before it of unfair labor practices committed prior or subsequent to the close of the Representation hearings, or any evidence of attempts to influence the election, or that the employees were dissatisfied with its result.

21. In said "Decision and Order," the Board concluded that the Truce Agreement was a means of adjusting a dispute between two A. F. of L. organizations, and that the parties did not intend it to be binding where one of the organizations left the A. F. of L. (R. 518).

2. On April 1, 1940, Teamsters, pursuant to Section 10 (f) of the Act, filed with the U. S. Court of Appeals for the

District of Columbia its petition to review and set aside the aforesaid order. On May 3, 1940, the Board filed its answer to the petition and in said answer requested enforcement of its order against McKesson. The decision of the court which petitioner seeks to review was rendered on May 5, 1941, said decision, by majority opinion, denying Teamsters' petition and granting, with modifications, the Board's request for enforcement. The court held that the Board was correct in its interpretation of the Truce Agreement, and that, as matter of law, the Truce Agreement was not legally effective to make Teamsters the representative of McKesson's employees. The court further held that the Board was not bound by the election and could disregard its results. And the court finally held that there was substantial evidence to sustain the Board's finding concerning the existence of unfair practices.

Groner, C. J. dissented on the ground that to affirm the Board's order was, first, to designate a representative of the employees contrary to their expressed preference, and, second, to penalize the employer for living up to a voluntary written agreement between itself and two disputing unions. He characterized the Board's action in ordering and holding an election and then repudiating the result, as arbitrary, and without rhyme or reason under the evidence.

23. Petitions for rehearing, filed by Teamsters and McKesson, respectively on May 20, 1941, were denied on June 21, 1941 (R. 598).

Questions Presented.

1. Whether the proviso of Section 8 (3) of the Act validates an agreement supported by ample consideration whereby all the employees involved in a jurisdictional controversy agree in advance, individually and through their unions, to the subsequent execution by the Employer of a

closed shop agreement with such of two contending unions as is determined, pursuant to the terms of such agreement, to have jurisdiction over them, to be entitled to their membership and to be their bargaining agent?

2. Whether employees may, for ample consideration and to settle a jurisdictional controversy that had shut down their places of work, contract, individually and through their unions, to give their consent to the making, subsequently, of a closed shop agreement between their employer and the union determined, by arbitration, to have jurisdiction over them and to be entitled to their membership, so as to constitute such chosen union as their appropriate collective bargaining unit at the time the contract is made, within the meaning of the proviso of Section 8 (3) of the Act?

3. Whether, where employees have entered into a binding agreement, individually and through their unions, to become members of such union as named arbitrators determine is entitled to their membership, as a result of which agreement other parties, including their employer, have acted to their detriment, they may, if the majority thereof so desire, disregard at will the terms of such agreement?

4. Whether, where employees have entered into a binding agreement, individually and through their unions, to become members of such union as named arbitrators determine is entitled to their membership, to which agreement their employer is a party, together with others, such employer, if acting in reliance upon such agreement and being required by such others to fulfill its obligations under such agreement, can be guilty of unfair labor practices thereby, even if in fact the majority of its employees have refused to abide by such agreement, unless and until the employees have taken, as they had ample time to, steps to have the Board annul such agreement?

5. Whether individual contracts entered into with each and every employee, with the consent of the two unions to which they belong and which are contending for jurisdiction thereover, whereby such employees have agreed to become members of such of the two unions as named arbitrators determine is entitled to their membership, are legal and valid?

6. Whether the due process provision of the Fifth Amendment to the Federal Constitution bars the Board from proceeding upon charges of unfair labor practices filed by a union, prior to its, the Board's decision in Representation proceedings involving the same controversy and the same facts alleged to constitute unfair practice, in which decision, based on such facts, the Board saw fit only to order an election to be held as the best means to resolve the controversy, and which election was fairly and impartially conducted, and resulted in the union requesting certification and filing the unfair labor practice charges losing the election?

7. Whether the Board is unlawfully exercising its powers where, after ordering an election to be held as the best means to resolve a jurisdictional controversy, and with full knowledge of all the facts, it, thereafter, and after such election is fairly held and the result fairly determined, and such result is adverse to the union requesting certification, without rhyme or reason, repudiates its own action and sets aside the election, and proceeds to hear the same facts and to determine thereon that the losing union and its members had been victims of unfair labor practices?

8. Whether an uncoerced election fairly held and determined on February 18, 1938, but among employees on the payroll as of October 28, 1937, and resulting in a majority vote for an A. F. of L. union, can validate a closed shop agreement made by the employer with said A. F. of L. union on November 15, 1938?

Specifications of Errors to be Urged.

The U. S. Court of Appeals for the District of Columbia erred:

1. In holding the closed shop contract of November 15, 1937, invalid, and the actions taken thereunder as unfair labor practices.

2. In holding the Truce Agreement ineffective upon withdrawal by one of the unions from the A. F. of L. and consequent affiliation by such union with the C. I. O.

3. In ruling that the Board was not bound by the results of the election held on February 18, 1938.

4. In ruling that the election held on February 18, 1938, did not validate the closed shop contract of November 15, 1937.

5. In holding that the finding of the Board that the election of February 18, 1938, was invalid because coerced was supported by substantial evidence.

6. In enforcing an order that penalizes an employer for living up to a voluntary written agreement between itself and two disputing unions.

7. In upholding arbitrary and unlawful exercise of power on the part of the Board.

8. In ruling that the proviso of Section 8 (3) of the Act did not permit employees to contract, in advance to the date thereof, and in order to settle a jurisdictional controversy between two contending unions, to give their binding consent to the execution of their employer of a closed shop contract with such of the unions as was thereafter, pursuant to the terms of the contract, determined to be entitled to the employees' membership.

9. In invalidating individual agreements entered into by employees, with the consent of their unions, designed to settle a jurisdictional controversy between their unions.

10. In ruling contracts between employers and employees, acting through their unions, abrogable at any time at the will of a majority of the employees.

Reasons for Granting the Writ.

1. In invalidating individual agreements entered into by employees, with the consent of their unions, designed to settle a jurisdictional controversy between their unions, the U. S. Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this Court. Further, said court has failed to give proper effect to the decision of this Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1, 57 S. Ct. 615, to the effect that the National Labor Relations Act does not prevent individual contracts with employees not designed to forestall or limit union activities.

2. In enforcing an order that penalizes an employer for living up to a voluntary written agreement between itself, two disputing unions and all the employees involved, the U. S. Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this Court. Further, such enforcement has the direct effect of defeating the principal purposes of the Act, which was "to avoid industrial strife by providing an orderly process of settling controversies."

3. In upholding the order of the Board herein the U. S. Court of Appeals for the District of Columbia has sanctioned such an arbitrary and unlawful exercise of power on

the part of, and course of procedure by, the Board, as to call for an exercise of this Court's power of supervision.

4. In holding the closed shop agreements of November 15, 1937, invalid, and the actions taken thereunder as unfair labor practices, the decision of the U. S. Court of Appeals of the District of Columbia is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.* (June 6, 1941), 120 F. (2d) 611, and the decision of the U. S. Court of Appeals for the Fifth Circuit in *Peninsular & Occidental Steamship Company* v. *N. L. R. B. et al.*, 98 F. (2d) 411, Cert. Den. 305 U. S. 653, 59 S. Ct. 248.

5. In holding the discharges herein improper, the United States Court of Appeals for the District of Columbia has failed to give proper effect to the decision of this Court in *N. L. R. B.* v. *The Sands Mfg. Co.* (1939), 306 U. S. 332, 59 S. Ct. 508.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari directing the U. S. Court of Appeals for the District of Columbia to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the judgment of the U. S. Court of Appeals for the District of Columbia may be reversed, and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

McKESSON & ROBBINS, INCORPORATED,
Petitioner,

By CLINTON ROBB,
FREDERIC WINGERSKY,
A. J. BRONSTEIN,
Its Attorneys.

Dated: September —, 1941.

BRIEF.

1. In invalidating individual agreements entered into by employees, with the consent of their unions, designed to settle a jurisdictional controversy between their unions, the United States Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this Court. Further, said court has failed to give proper effect to the decision of this Court in N. L. R. B. v. Jones & Laughlin Steel Corp. (1937), 301 U. S. 1, 57 Supreme Court 615, to the effect that the National Labor Relations Act does not prevent individual contracts with employees not designed to forestall or limit union activities.

With respect to this contention, McKesson respectfully calls to the attention of this Court the history of the jurisdictional controversy between Local 38-117 of the Longshoremen, and Teamsters, that from the first of the year of 1937 until the signing of the Truce Agreement kept the five plants hereinbefore referred to closed. Nothing will be gained by repeating the story herein. It is set forth fully in the Board's decision reported in 5 N. L. R. B. 70, at pages 75-77, and it is repeated in the Board's decision herein (R. 505-507). It cannot be controverted but *that this has not been a case of interference by management with the rights guaranteed to employees by the Act. This has been a jurisdictional controversy between two unions, in which controversy the employer was the victim.* The Board so recognized, and so did the court below, the court saying:

> "It is but fair to say that until August, 1937, McKesson stood in the cross fire of battle between contending unions, victim of the struggle rather than combatant. As far as the record shows, it maintained a

hands-off policy as long as the fight was confined to the ranks of the A. F. of L., both in the Seattle plants and elsewhere."[1]

As the record also discloses (R. 263, 448) many attempts were made from time to time to settle this jurisdictional controversy between the two unions, the negotiations culminating in the Truce Agreement, apparently the only type of agreement the parties could determine upon to settle a disastrous civic problem.[2] It was a valid agreement under Washington law and it created valid rights and obligations. See *Gord* v. *F. S. Harmon & Company* (1936), 188 Wash. 134, 61 Pac. (2d) 1294, at 1296. It was designed to settle, once and for all, and according to the decision of the A. F. of L. Convention, this jurisdictional controversy.[3] For this

[1] The court could well have gone further, and placed such date much later, but for an unwarranted assumption of fact. In the record, at pages 187-197, appears a copy of a Memorandum of Working Agreement made and entered into on August 18, 1937 by and between McKesson and the A. F. of L., acting for itself and its affiliated organizations and member local unions, in order to comply with the Act. The court assumed this Working Agreement was entered into because of the withdrawal of the certain Pacific locals of Longshoremen, including Local 38-117, from the A. F. of L., and made capital of the fact there was no such similar agreement with the C. I. O. In fact, said Working Agreement was entered into upon the theory that the A. F. of L. was, nationally, the representative of a majority of McKesson's employees at all its divisions and to comply with section 9 (a) of the Act. Important here is the fact the record discloses nothing to indicate McKesson knew of the change of affiliation from A. F. of L. to C. I. O. here involved prior to September 27, 1937 (R. 178-9) which was subsequent to the execution of the Working Agreement, or that the Working Agreement was in any way caused or affected by this controversy.

[2] So disastrous to the city was the continuance of the controversy that a Citizens' Committee was formed to aid in its settlement. The Citizens' Committee consisted of a group of representative citizens who "tried to meet both sides and work out some solution of the disputes" (R. 376). It comprised D. W. Bowen, president of Puget Sound Sheet Metal Works, C. H. Howell, vice-president of the Seattle First National Bank, Victor Elfendahl, vice-president of Skinner & Eddy, S. S. Sayres, president of the American Automobile Corp., Nathan Eckstein, president of Schwabacher and Company, and R. J. Venables, attorney (R. 391-2).

[3] See letter of Citizens' Committee published on November 13, 1937 (R. 181).

reason, all employees were required to sign it, so as to be bound regardless of what happened to their unions.

Yet despite these facts, the Board and the court disregarded the Truce Agreement, and further penalized the Employer for living up to its obligations thereunder. Does this mean then that unions contending for jurisdiction cannot settle their differences by mutually agreeing upon certain persons to make a determination of such differences? Does this mean that arbitration to determine jurisdictional controversies is unenforceable? For if an employer, faced with such controversies, as also with a settlement thereof, as herein developed, must at the same time realize that a change of union affiliation by his employees will make any of his actions under such settlement improper, even if he faithfully performs his part of the bargain, and such change of affiliation being most natural for the losing union, it has no alternative but to allow the controversy to continue, to the great loss of its employees. McKesson would have stayed closed here, had it supposed the Truce Agreement was not a permanent adjustment of the problem (R. 398-9), or had it even deemed it possible its actions thereunder, at least until after the Board barred such action, could be deemed unfair labor practices and productive of orders such as are here in question. It is submitted that both the Board and the court are in error, and that such an agreement as the Truce Agreement is legal and valid, and action thereunder proper, unless and until at least the Board, in the exercise of the powers granted to it by the Act, annuls the same, whether because no longer indicative of the desires of the employees involved, or however otherwise. And if this be so, an employer is warranted in becoming a party to such agreements, and thus the fundamental purpose of the Act, to protect interstate and foreign commerce from interruption

and obstruction caused by industrial strife, will best be served.

Both the Board and the court reached their conclusion as much upon the basis that the Truce Agreement, as a matter of interpretation, was not intended to be binding if Local 38-117 left the A. F. of L., as for any other reason. Never was an interpretation so wrong, but even if right, it still is submitted that where, as here, both the Board and the court recognize that McKesson honestly regarded itself as obligated to take action under the Truce Agreement, an agreement as to which "the legal rights and obligations of the parties have been involved in doubt" (R. 526), a charge of unfair labor practices because of actions thereunder cannot be sustained, but only an election ordered to determine the desires of the employees. (See dissenting opinion of Groner, C. J.) And this indeed must have been the reasoning of the Board when, in the Representation proceedings, it ordered such election to be held.

We repeat, however, never was an interpretation so wrong. The record conclusively and overwhelmingly demonstrates that all parties, inclusive of Local 38-117, intended the Truce Agreement to be binding even if Local 38-117 left the A. F. of L. *As to McKesson,* it would not have opened, save for the fact it deemed the controversy finally and fully settled (R. 398-9). *As for the Citizens' Committee,* even prior to the Representation proceedings and subsequent to McKesson's receipt of the September 27, 1937 letter from Local No. 9's members in its McKesson-Stewart plant, such Committee addressed a letter to McKesson urging it to abide by the terms of the Truce Agreement. The letter appears in the record at pages 176-8. After the Representation petitions were filed, the Committee interviewed Mr. Bradshaw, business agent of Local No. 9 (R. 21) and tried then to get him "to turn the membership over to the Teamsters" and "urged the performance or carrying

out of the terms of the" Truce Agreement (R. 283). Failing, it published the November 13, 1937 statement (R. 181), deploring Local No. 9's breach of contract, etc. *As to the three other companies,* it was testified to on their behalf, and there is no contradiction in the record, that it was necessary that the controversy be "finally settled" before they reopened (R. 386) and they "never assumed that there would be any further difficulty" (R. 386). Indeed, as heretofore noted, on November 18, 1937, West Coast Wholesale Drug Co. also entered into a closed shop contract with Teamsters. *As to Teamsters,* it demanded McKesson live up to the terms of the Truce Agreement on penalty of closing it down (R. 401) and McKesson, after consulting the Citizens' Committee, so did. *As to the employees,* men of mature years, the Board itself notes (5 N. L. R. B. 85) "a substantial number of employees of McKesson-Stewart who were members of Local No. 9 and had signed pledge cards, applied on November 17, 1937, for membership in the Teamsters' Union." Some testified that they went back to work with the understanding they would live up to the Truce Agreement and that they went A. F. of L.,, when it was given jurisdiction, because of such agreement (R. 136). Their vote in the election as expressing such preference is unanswerable. *And as to Local No. 9,* attention is called to the testimony of Mr. Bradshaw on page 273 of the Record, and his further testimony on page 280 of the Record. Even after Local No. 9 was affiliated with the C. I. O., it had not made up its mind not to be bound by the Agreement. It only so decided "in the last few days" preceding the Representation hearings (R. 280). And it is to be noted (R. 404 note 5) that this was indeed one of its original thoughts. Moreover, Mr. Molthen, the Local No. 9 attorney, even knew of the so-called supplemental agreement and signed it (R. 271).

Can the Truce Agreement, despite the above, be inter-

preted as the Board and court indicate? The record conclusively indicates *Local No. 9 knew, before the execution of the Agreement, it might leave the A. F. of L.* (R. 252, 273). In May 1937, it contemplated leaving—there was only a "possible" chance of remaining. *Yet in the Truce Agreement thereafter executed, it made no attempt to protect itself in such event, because it nevertheless intended to abide by it.* It so testified (R. 273, 280).

Thus it is apparent the Board and the court have gone to unprecedented lengths in holding the Truce Agreement binding only if Local No. 9 remained in the A. F. of L. *Rather than that none of the parties intended the Truce Agreement to be binding in such case, in fact all of the parties intended the Truce Agreement to be binding in such case, including Local No. 9.* Its reason for not abiding by the Truce Agreement was, and only was, the legal contention that having left the A. F. of L. before the decision at the Denver Convention, it "could not be bound by any decision of a group of people who we were not a part of would make" (R. 274, 210), despite the fact it had, until a few days before the Representation hearings, felt differently. *Indeed, in fact, it formed Local No. 9 to avoid the effects of what it guessed would be an adverse decision of the A. F. of L.* This was the uncontradicted testimony of Local No. 9 witnesses (R. 358).

Groner, C. J., dissenting below, held that the proper interpretation of the Truce Agreement was as McKesson interpreted it.[4]

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[4] To refer to the Supplemental Agreement as supporting the Board's and the court's interpretation is singular. McKesson did not know of such agreement. Moreover, nothing is so clear as that, where a condition exists which might affect the performance of a contract and such condition is known to the parties, who make no exception therefor, the parties are presumed to intend that the occurrence of the condition, if it occurs, shall not operate to affect the performance of the contract. See 12 American Jurisprudence page 935; Williston on Contracts, Rev. Ed., Volume 6, page 5476,

As has been heretofore noted, each McKesson employee approved the Truce Agreement and agreed to be bound thereby, a step entirely meaningless if the court's interpretation aforesaid is correct. This Court has said in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893, as follows (p. 44):

> "The provisions of Sec. 9(a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the employer only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute * * * (Referring to the case of Virginian Railway Co. *v.* System Federation No. 40, 300 U. S. 515) * * * we said (therein) 'that the obligation to treat with the true representative was exclusive and hence imposed a negative duty to treat with no other.' We also pointed out that, as conceded by the Government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with any one purporting to represent employers' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees.' We think this

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citing cases; *Chicago, Milwaukee & St. Paul Railway* v. *Hoyt, et al.*, 149 U. S. 1, 13 Supreme Court 779.

Even more singular is the fact that such interpretation is predicated upon the assumption Longshoremen left the A. F. of L. This assumption is erroneous. Longshoremen never did leave the A. F. of L., although some of its locals did. There was a matter of jurisdiction to be arbitrated and it was, before the A. F. of L. Convention held in Denver in October 1937 as between Longshoremen, still members of the A. F. of L., and Teamsters.

construction also applies to Sec. 9(a) of the National Labor Relations Act."

By this statement, it has been definitely determined that individual contracts with employees are not void, and that the provisions of the Act do not preclude an employer from making such contracts with his employees. They become so, only if a consequence of unfair labor practices or if they in themselves thwart any policy of the Act. See *National Licorice Co.* v. *N. L. R. B.* (1940), 309 U. S. 350, 361, 60 Sup. Ct. 569; *Williams Mfg. Co., et al.* v. *United Shoe Workers of America, Local 119* (1937—Court of Common Pleas, Ohio), 1 Labor Cases 278. The contract signed by each employee here was not a consequence of unfair labor practices. It thwarted no policy of the Act. Rather, as has been demonstrated, it best served the purpose of the Act. And it was, further, entered into with the consent of the unions representative of the individual employees. To disregard it is to disregard this Court's decision in *N. L. R. B.* v. *Jones and Laughlin Steel Corp., supra.*

2. In enforcing an order that penalizes an employer for living up to a voluntary written agreement between itself, two disputing unions and all the employees involved, the United States Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this Court. Further, such enforcement has the direct effect of defeating the principal purposes of the Act, which was "to avoid industrial strife by providing an orderly process of settling controversies."

In effect, much of what has been heretofore under the aforesaid reason argued, is here applicable. Affirmance of the Board's order is to require McKesson to pay to each of the discharged men unearned wages since January, 1940.

It is to require McKesson to reopen once again the entire controversy. Affirmance, under these circumstances and in these conditions is ruinously punitive, not remedial. It has been judicially declared by this Court in *Consolidated Edison Co., et al.* v. *N. L. R. B.* (1938), 305 U. S. 197, 59 Sup. Ct. 206, that the power of the Board to command affirmative action is remedial, not punitive. Here, especially in circumstances wherein the Board itself has admitted that the parties' legal rights and obligations have been involved in doubt and McKesson's action to have been predicated upon an honest reliance on what it has always conceived to be the proper interpretation of the Truce Agreement, it is obvious the order is punitive. The court below in refusing to condition its enforcement of the order upon a new election demonstrating Teamsters not to be the choice of McKesson's employees has at least failed to adjust its relief to the exigencies of this case in accordance with the equitable principles governing judicial action. *Ford Motor Co.* v. *N. L. R. B.* (1938), 305 U. S. 364, 59 Sup. Ct. 301.

That enforcement will defeat the purpose of the Act, and rather than avoiding industrial strife, will reopen same, is easily demonstrated. The date the hearing on unfair labor charges began was September 19, 1938, some seven months after the election. During that entire time McKesson's employees had employment, and no difficulties with the Company (R. 109, 123, 151). The testimony thereunto is uncontradicted. It proves beyond question the employees made the choice they desired and were happy to abide by it. From September 19, 1938, to date, the records of the Board are bare of any problems arising between McKesson-Stewart and its employees, a rather singular thing in view of the intense struggle preceding the execution of the closed shop contracts. The employees have then continued happy in their choice. In this connection, events at the West Coast Wholesale Drug Co., subsequent to the election

held in February, 1938, and resulting in the Teamsters proving their right to represent the employees must be recalled. It follows the present denying to Teamsters of the right of representation of "any" of McKesson's warehouse employees (R. 528; 1 (c) of Order) is, if not unlawful, at least a reopening of this entire controversy. To reinstate men, known to be C. I. O. members, in the face of a closed shop agreement with an A. F. of L. local operative since November 15, 1937, which agreement McKesson is required to cease giving effect to (R. 528; Order 1 (b)) is, either a nugatory act, as where the employees desire to continue to be A. F. of L. members, or, if they do not, necessarily an invitation to the renewal of the controversy now since November 15, 1937, at rest.

3. In upholding the order of the Board herein the United States Court of Appeals for the District of Columbia has sanctioned such an arbitrary and unlawful exercise of power on the part of, and course of procedure by, the Board, as to call for an exercise of this Court's power of supervision.

The earliest action herein alleged to be unfair is the distribution by McKesson, at the request of Teamsters, to its employees at both the McKesson-Stewart and Blumauer Frank divisions on October 27, 1937, of copies of a letter signed by W. L. Glazier, Secretary-Treasurer of the Teamsters' Union (R. 509, 515), informing them that, at the October Convention of the A. F. of L., jurisdiction over warehousemen of the character here involved, had been granted to Teamsters (the letter appears in the record at pages 438-9) and stating that the employees would be expected to live up to the terms of the Truce Agreement signed by them, and that they should make application for membership in Teamsters. All other action is as of a later date, namely, the signing of the two "labor relations schedules" (closed shop agreements) on November 15, 1937

(R. 510), the handing to each employee of the so-called Van Vaerenwyck letter with its enclosure of a membership application card to Teamsters on the same day (R. 510); the demanding on November 16, 1937, at McKesson-Blumauer, of the signed application cards for membership in Teamsters, its closing down that day, and the offering to four McKesson-Blumauer employees of employment at McKesson-Stewart if they joined Teamsters (R. 511-512); and the keeping from work of McKesson-Stewart employees on November 17, 1937 (R. 513). The Representation hearings were held on November 18 through November 22, 1937. In such hearings, as has heretofore been shown, and as the Board itself noted in its "Decision and Direction of Elections", and in its amendment thereto, full evidence of all of the foregoing was presented. Indeed, but one day later than the close of the hearings, namely on November 23, 1937, Local No. 9 actually filed the complaints of unfair labor practices here in question and based upon all of the foregoing. Thus the Board necessarily considered all of such action when it fixed, for the election it directed, an eligibility date as of "the payroll period next preceding October 28, 1937." *Such date was precedent to any action herein.* The election was ordered with the full knowledge on the part of the Board that McKesson had signed closed shop agreements with Teamsters, and with the Board fully informed of all the facts on which it acted herein. It was obviously the purpose of the election to determine which of the unions represented the majority of the men. There is here no charge nor evidence of coercion of the electorate on the part of McKesson or Teamsters. Local No. 9 fully participated therein. The election was conducted by the Board, and McKesson took no part therein. No one claims it was not fairly held or determined. The Regional Director, in spite of the pending complaints before him, recommended action upon the strength of the election. All this being so,

what justification is there for the Board's course here, for it ruling it to be clear that the election could not be deemed determinative of the desires of the employees as of a date prior to November 15, 1937 (R. 521). Upon what can this ruling be based? What rhyme or reason is there in first ordering an election after demonstrably careful thought, and holding it, and then ignoring its results? It is submitted that the Board here has adopted such an arbitrary and unprecedented course of procedure in administering the Act, which procedure the court below has sanctioned, as to call for the exercise of this Court's power of supervision. This can be clearly and easily demonstrated, as follows:

a. The Board has said it "attempts to hold an election at a time when the balloting will accurately reflect the untrammeled desires of the employees", and consequently if it finds unfair labor practices "it usually postpones the election until some future time after its decision, when the effects of the unfair labor practices will have been dissipated." National Labor Relations Board, 4th Annual Report, p. 77. With a record before it replete with evidence possibly supporting charges of coercion, intimidation, discrimination, unfair discharges, etc., the Board did not see fit here to postpone the election indefinitely or for a time sufficient, in its opinion, to allow the effects, if any, therefrom to become dissipated. Why? Because it chose, as an eligibility date for determination of voters, a date preceding all such acts, so that the voice of the employees would be unimpaired by their effects. Because again the longer the election was delayed, the more fixed might become the status created by such acts, if unfair, and the harder to correct. But it did see fit to disregard the results of such election when, to its surprise, they were different than it supposed they would be.

b. Where Representation Cases have also involved allegedly unfair labor practices, and Local No. 9 introduced testimony as to the foregoing obviously directed towards this end, and the Board has found that such practices existed, it has frequently, in addition to postponing the election ordered such other action as it deemed necessary or appropriate. If the Board, on the record before it, had felt the schedules and discharges were improper, it could have ordered that McKesson then cease their enforcement, and reinstate the employees in question. (See in the *Matter of Williams Manufacturing Company et al.*, 6 N. L. R. B. 135.) Why then was no other action herein ordered by the Board? Why then did the Board not order McKesson to cease enforcing the schedules and to reinstate employees? Why did it only order an election? Because in this case, the practices in question now alleged to be unfair, might have been proper and legal, if, as indeed proved to be the case, as of the date thereof, Teamsters was the chosen representative of a majority of the employees. Because, if as of the date of the signing of the closed shop agreements, it was indeed true that Teamsters had the majority, these acts were legal and of no consequence herein. And, because in this case, these practices might have been not only proper, but required, by the terms of the Truce Agreement. In other words, not only does an election effectively dispel doubts as to the present wishes of employees, it also dispels doubts as to whether their past wishes were freely expressed or improperly influenced. See *United Shoe Workers of America Local 132, et al.* v. *Wisconsin Labor Relations Board, et al.* (Wis. Circuit Court, Dane County, decided December 24, 1937 (see 1 Labor Cases (C. C. H.) 334), modified and affirmed in 227 Wis. 569, 279 N. W. 37 (1938), where the court states:

> (p. 335): "Justice may point to an election as the fairest and most unequivocal means of determining the

> desires of the majority. *An election would dispel the suspicion that it was the employer's past practices,* held by the Board to be unfair, *which had an influence in attaining the AFL majority* and that the majority therefore may not be a true majority." (Italics added.)

Yet when the results of the election were known, when it demonstrated these practices were all legal and proper, under the proviso of section 8 (3) of the Act, the Board chose to disregard it. In this connection, the following quotation is so appropos that it must be cited. *Stewart Die Casting Corp.* v. *N. L. R. B.* (1940) (C. C. A. 7th), 114 F. (2d) 849 (2 Labor Cases 909),

> *Page 859:*
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> "We are not unmindful of the familiar argument advanced by the Board that a fair election cannot be had until the last vestige of unfair labor practice has been removed as required by the Board's order. In other words, so it is argued, the unfair acts on the part of the employer create in the employee a state of mind which prevents a free expression of opinion on his part. To us this argument is imaginary rather than real. In fact, the opposite effect, if any, would be the natural result. We accord to the ordinary employee intelligence such as will enable him to show when he is being imposed upon by his employer, as well as the ability to properly protect his own interest in an election conducted by secret ballot, for the purpose of determining whom he desires as his bargaining agent."

c. It has already herein been demonstrated how, for the purposes of the election, the Board had held that all the warehouse employees of McKesson-Blumauer were entitled to vote, an order which heavily and unduly favored Local No. 9. Obviously, therefore, if the election was close and had been won by Local No. 9, and since the complaining McKesson-Blumauer employees comprised 15 of a total of 63 eligible voters and 15 of the 27 votes cast for Local

No. 9, it would have been proper to object to certification of Local No. 9 by pointing out that the votes of these temporary, and not to be retained, employees, had turned the election with the result that the true wishes of the to-be-retained McKesson-Stewart employees had been disregarded. As the Board has said in *Southern California Gas Company* (1939), 10 N. L. R. B. 1123, at 1142,

> "It would not be fair to permit temporary employees to participate in the choice of bargaining representatives where their period of employment with the company has been extremely short or intermittent or has not been recent."

Yet, despite such action by the Board, made without according McKesson an opportunity to object thereto, and its failure to turn the tide of ballots against Teamsters, still the Board refused to recognize the results of the election. It even went further. Despite its knowledge of events as they took place at West Coast Wholesale Drug Company, despite its Regional Director's recommendation that Teamsters be certified, it held McKesson guilty of unfair labor practice, and this, even without conditioning its order upon another election being held and so proving or disproving Teamsters' present majority.

McKesson therefore confidently submits that the Board here has unfairly and arbitrarily sought to exercise its powers under the Act (See dissenting opinion of Groner, C. J.). With all the evidence before it the Board ordered an election held to resolve the very question here involved, namely, the right of McKesson to do the very things alleged herein to be unfair. It was an election by secret ballot, so that the voting could be free. It was an election held fairly and impartially, and the results thereof resolved the entire question here presented, by proving that, as of a date preceding the alleged unfair labor practices, they were legal and proper, because Teamsters then represented a majority

of the McKesson employees. These results cannot be disregarded. The election must be given force or effect. How, after the results of the election were known, could it have been charged here by the very Regional Director, who had certified to the contrary, that at the time of signing the closed shop agreements Teamsters represented practically no employees? What else did the election determine, if not to the exact contrary? McKesson submits that rarely is a case presented to a court so baffling as to its purposes, as is this case. Local No. 9 had been defeated in its attempts to prove that it was the proper bargaining agency for McKesson's employees. The procedure adopted here permits no other conclusion but that the Board desired to give to Local No. 9 another opportunity whereby it might yet be made bargaining agent, the first having failed. Such action should not be countenanced by this Court. As broad as are the powers of the Board, yet an abuse of procedure is not beyond the power of the courts to restrain. *N. L. R. B.* v. *Jones & Laughlin Steel Corp., supra,* at page 46, and *United Baking Company, Inc.* v. *Bakery & Confectionery Workers' Union, Local 221* (1939), 170 Misc. 199, 9 N. Y. S. (2d) 964, affirmed 257 App. Div. 501, 14 N. Y. S. (2d) 74.

4. In holding the closed-shop agreements of November 15, 1937, invalid, and the actions taken thereunder as unfair labor practices, the decision of the United States Court of Appeals of the District of Columbia is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in N. L. R. B. v. Electric Vacuum Cleaner Co., Inc. (June 6, 1941), 120 F. (2d) 611, and the decision of the United States Court of Appeals for the Fifth Circuit in Peninsular & Occidental Steamship Company v. N. L. R. B., et al., 98 F. (2d) 411, Cert. Den. 305 U. S. 653, 59 Supreme Court 248.

Whether a closed shop agreement is valid or not depends upon whether the circumstances of its execution comply with

the conditions prescribed in Section 8 (3) of the Act. They are that the labor organization with which the agreement is made shall be one which is (1) not established, maintained, or assisted by an unfair labor practice and (2) the representative of a majority of the employees in the appropriate unit covered by the agreement "when made." *International Association of Machinists* v. *N. L. R. B.* (1940), 311 U. S. 72, 61 Supreme Court 83. No question is here presented concerning the appropriateness of the unit. Nor is there any as to the freedom of Teamsters from domination by McKesson. The only issue is whether Teamsters represented a majority of the McKesson employees at the date the contract was made. If it did, the contract was valid, and action thereunder legal. The Board found, and this was confirmed by the Court, no such majority.

In contending there was such majority in fact, McKesson has already noted that the election held by the Board in February, 1938, from employees as of a date prior to November 15, 1937, disclosed that such majority existed. As the Board noted, Local No. 9, despite the Truce Agreement, had undertaken to secure authorization cards from the employees in September, 1937. But then came the decision of the A. F. of L. Convention, and many employees who had signed such cards thereafter joined Teamsters (5 N. L. R. B. p. 85). "This indicated", said the Board, "the possibility of a change in the (employees') desires • • • concerning representation • • • there (was) doubt as to the present desires of the employees" concerning the same (5 N. L. R. B. p. 85). To resolve the doubt, an election was ordered to indicate the free and uninfluenced choice of the employees, and it indicated Teamsters as the choice of a majority of McKesson's employees, as of a date precedent to the execution of the closed shop agreements. It follows the closed shop agreements were valid, as was all action taken to put them into effect. *N. L. R. B.* v. *Lion Shoe Company* (C. C. A. 1st 1938), 97 F. (2d) 448.

In contending further that there was such majority in fact, McKesson has heretofore also noted that such closed shop agreements were in fact entered into because of, and were indeed required, by the terms of the Truce Agreement, the treatment heretofore being primarily as to its proper interpretation. The contention here made, and one that was also made before the court, is somewhat different. It is that, even if the election cannot relate back to a date prior to October 28, 1937, so as to validate all action thereafter taken, the closed shop contracts relied upon are not the November 15, 1937 contracts, but the Truce Agreement itself, which was signed by all the McKesson employees.

In support of this contention, it is to be noted Section 8 (3) does not specify the time at which the consent of the majority may be shown. The statute merely provides that the consent must be effective when the closed shop agreements are made. Here the consent was manifested in the Truce Agreement, already demonstrated to be a valid and enforceable agreement. It was the consent of all the employees, whether members of Local 38-117 of Longshoremen, or of Teamsters. It was a consent designed to solve a jurisdictional controversy. *And in effect it was a joint closed shop agreement between the two contending unions, freezing the status until the determination therein provided for could be had.* Such an agreement, while rare, is not unique. Recently a strike settlement was negotiated under the auspices of the Board, among employees of the E. F. Hauserman Company, at Cleveland, Ohio. Such settlement provided for the employees to be members of either a named A. F. of L. or C. I. O. union, for the plant to open, and for the A. F. of L. to retain its status as sole bargaining agency until a date stated, when a new election would be conducted by the Board to determine the new representative. In the contract effecting such settlement, the C. I. O. union withdrew charges of interference, discrimination and refusal to

bargain filed with the Board, and the employer withdrew a petition for an election and agreed to sign a contract with the certified union. (See Labor Relations Reporter Volume 8 No. 9, April 28, 1941, page 267.)

This, it is contended here, was the meaning of the Truce Agreement. Every employee was a union member, of Local 38-117, or of Teamsters. The fact that practically all employees voted in the election proves this. Every employee returned to work under his then union affiliation, and agreed to be bound by the decision of the A. F. of L. Convention as to jurisdiction. Suits then pending were dismissed. However jurisdiction was finally awarded, the employees agreed to accept same—that is, to apply for membership in the proper union having jurisdiction over them. This is the meaning of, and the only meaning possible for, this Truce Agreement effected between employees, all union members. And if this be so, the Truce Agreement is, of course, valid, because signed by all the employees when made.

In this connection, McKesson calls to the attention of the Court the recent case of *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.*, 120 F. (2d) 611, decided by the United States Circuit Court of Appeals for the Sixth Circuit on June 6, 1941. The case decides that section 8 (3) is not limited to the standard accepted form of closed shop agreement. It does not prohibit mutual cooperation between parties. The express purpose of the Statute was the establishment of industrial peace, and the proviso of Section 8 (3) was enacted to give the employer an opportunity of dealing in an orderly fashion with one organization only, instead of with various conflicting organizations. If industrial peace requires contract with two organizations, rather than one, such a contract is encompassed within the scope of the proviso. And the Board has so recognized in the E. F. Hauserman Company settlement.

But even if the Truce Agreement is not a closed shop agreement that stands or falls upon the question of whether a majority of employees agreed thereto at the time it was made, as all did, it has been shown it required the execution of the closed shop contracts on November 15, 1937, to which execution the employees, *in advance, had contracted* to give their consent. Will such a consent, effective when the contract is made, satisfy the proviso of section 8 (3) and will such a contracted consent, supported by ample consideration, granted for a time certain, continue effective despite attempted revocation by the majority? These now become the questions to be considered.

That stability in industrial relations requires recognition of consent granted prior to, but effective at the time of the execution of, a closed shop agreement, provided the time elapsing be not unreasonably long, is obvious. If this should not be so, then any labor contract entered into today has no meaning tomorrow, if another union may come along and, claiming it can obtain better employee treatment, cause the employees to change their affiliation. The consent here required was not for an unreasonable length of time. The Convention was to be held in October, only four months from the execution of the Truce Agreement. Moreover, the *status quo* was frozen in the interim, so that the employees' bargaining rights were not to be prejudiced. And if operating under such consent a closed shop agreement is entered into, it is valid, as is action thereunder. This is in effect the holding of *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc., supra,* wherein authorizations for representation given unions by employees, to be effective for one year and thereafter, subject to thirty days' notice of withdrawal, were held legal in every respect, reasonable as to term, effective until withdrawn, and effective to support action taken thereunder. The signing the authorizations entitling the men to the benefits of union membership, including the benefits

of a labor contract, in turn was held to require the binding of the men at least during the term of the authorization, not to disrupt the contract entered into on the strength of such authorizations. Here, similarly, the employees bound themselves by the Truce Agreement to continue to keep their consent effective. It was effective on November 15, 1937, and the closed shop contracts were valid.

The Board has indeed itself held that the proviso of section 8 (3) applies equally to a preferential employment contract, as to a closed shop contract. *J. E. Pearce Contracting and Stevedoring Co. Inc.* (1940), 20 N. L. R. B. 1061. In *Peninsular & Occidental Steamship Company* v. *N. L. R. B. et al.,* (1938) 98 F. (2d) 411, cert. den. 305 U. S. 653, 59 S. Ct. 248, where there was a preferential employment contract, the Circuit Court of Appeals for the Fifth Circuit refused to uphold a charge of unfair labor practice based upon action taken pursuant to such contract while it still was in force.

Will consent, such as is here given, continue effective despite attempted revocation by a majority? Again it is obvious that stability in industrial relations so requires. If employees can change their minds at will, no labor contract is worth the paper it is written on. Both in *J. E. Pearce Contracting & Stevedoring Co. Inc., supra,* and in *Peninsular and Occidental Steamship Company, supra,* change in affiliation by a majority of employees during the term of the contract failed to affect the results. Similar holdings will be found in *M. & M. Wood Working Company* v. *Plywood & Veneer Workers Local Union No. 102* (1938) (U. S. D. Ct. Oregon), 23 Fed. Supp. 11, holding a closed shop agreement unaffected by change in affiliation of members of the local union; *M. & M. Wood Working Company, et al.* v. *N. L. R. B.* (1939) (C. C. A. 9th Circuit), 101 F. (2d) 938, wherein the court set aside the Board's order on the ground the discharges in question being in

compliance with a lawfully executed closed shop, were not discriminatory, even though a majority of membership of the contracting union subsequently withdrew and organized a new and previously nonexistent union; *Pennsylvania Labor Relations Board* v. *Red Star Repairing Co., Inc.*, decided on December 15, 1937 by the Pennsylvania Court of Common Pleas, No. 2, and reported in Volume 1 Labor Cases (C. C. H.) page 341, (exceptions dismissed 1 Labor cases (C. C. H.) page 668 on May 3, 1938); and *Matter of Triboro Coach Corp.*, 104 N. Y. L. J. 807, 22 N. Y. S. (2d) 1013, affirmed 27 N. Y. S. (2d) 83 and again affirmed by the New York Court of Appeals on July 29, 1941 (C. C. H. Labor Law Service, parag. 60, 640). These cases make it clear that to hold that a labor contract may be abrogated at any time at the will of a majority of workers thwarts the very purpose of labor legislation, makes the contract lacking in mutuality and reciprocity of obligation, and deprives those employees not desiring change of their property and contractual rights. What is more these cases are law in the State of Washington, whose law governs this Truce Agreement. *Local No. 2508, Lumber & Sawmill Workers Union, et al.* v. *Cairns, et al.*, 197 Wash. 476, 85 Pac. (2d) 1109 (1938); *Lumber & Sawmill Workers Union No. 2623, et al.* v. *International Woodworkers of America, Local No. 49, et al.*, 197 Wash. 491, 85 Pac. (2d) 1099 (1938).

One of the reasons for the court reaching the limited interpretation it gave to the scope of the Truce Agreement was that it had no definite term, whether in months or in years, and it could not be the employees intended to be forever bound. McKesson never so contended. It contended first that the employees bound themselves only to abide by the decision of the A. F. of L. Convention, and contracts entered into pursuant to such decision, as any other, would be binding only for such period of time, in cases of change of affiliation, as the Board, subject to re-

view by the Courts, determined was necessary, balancing the needs of industrial stability with as full a recognition of employee rights as was possible. Even more important, McKesson respectfully submitted to the court, and here respectfully submits, that it has never been required herein to contend that the Truce Agreement was necessarily always binding and in all circumstances. McKesson can admit, for the purposes hereof, that the employees signing the Truce Agreement were not thereby barred *at any time* from changing their minds, and if a majority thereof so did, *from requesting the Board so to certify and to annul the Agreement,* thereby making it impossible for McKesson to carry out the agreement. All McKesson here is required to contend, as it fully believes must be the law, is that the Truce Agreement was valid and binding upon it, and that it was required to abide thereby, *until such time as the Board, for any reason it saw fit, ordered it to cease giving any effect thereto by virtue of the powers granted to it by the Act; and that, until the Board so ruled, all action pursuant thereto, inclusive of the action herein complained of, could not be an unfair practice.* And there was ample time herein for the employees, if indeed they desired to change their representative and no longer to abide by the terms of the Truce Agreement, to take action before the Board thereunto. Long prior to October 28, 1937, when Local No. 9 filed its Representation petitions, said date being a date after the decision of the A. F. of L. Convention had fixed obligations under said Truce Agreement, it could have in fact filed its petitions, and made it legally impossible, if such is the law, for McKesson to abide thereby. Not doing so, it cannot be that McKesson, in abiding thereby, can be guilty of unfair labor practice. This position has been recently stated with overwhelming force in *Matter of Triboro Coach Corp., supra.*

5. In holding the discharges herein improper, the United States Court of Appeals for the District of Columbia has failed to give proper effect to the decision of this Court in N. L. R. B. v. The Sands Mfg. Co. (1939), 306 U. S. 332, 59 Supreme Court 508.

In *N. L. R. B.* v. *The Sands Mfg. Co.* (1939), 306 U. S. 332, 59 Supreme Court 508, this Court has held specifically that the Act does not prohibit an effective discharge for repudiation by an employee of his agreement. See *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc., supra.* There can be no doubt the discharges herein in question were for the sole reason the employees refused to abide by the terms of the Truce Agreement and join Teamsters. And when the complaining witnesses herein refused to abide by the Truce Agreement, when they irrevocably repudiated the same, McKesson was at liberty to treat them as having severed their relations with the company and to replace them with others, as it did. See also *N. L. R. B.* v. *Columbian Enameling & Stamping Company, Inc.*, 96 Fed. (2d) 948 (C. C. A. 7th 1938), affirmed (1939) 306 U. S. 292, 59 Supreme Court 50.)

Respectfully submitted,

McKesson & Robbins, Incorporated,
By Clinton Robb,
Frederic Wingersky,
Aaron J. Bronstein,
Its Attorneys.

APPENDIX.

National Labor Relations Act.

Sec. 2. When used in this Act—

(6) the term "commerce" means trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) the term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

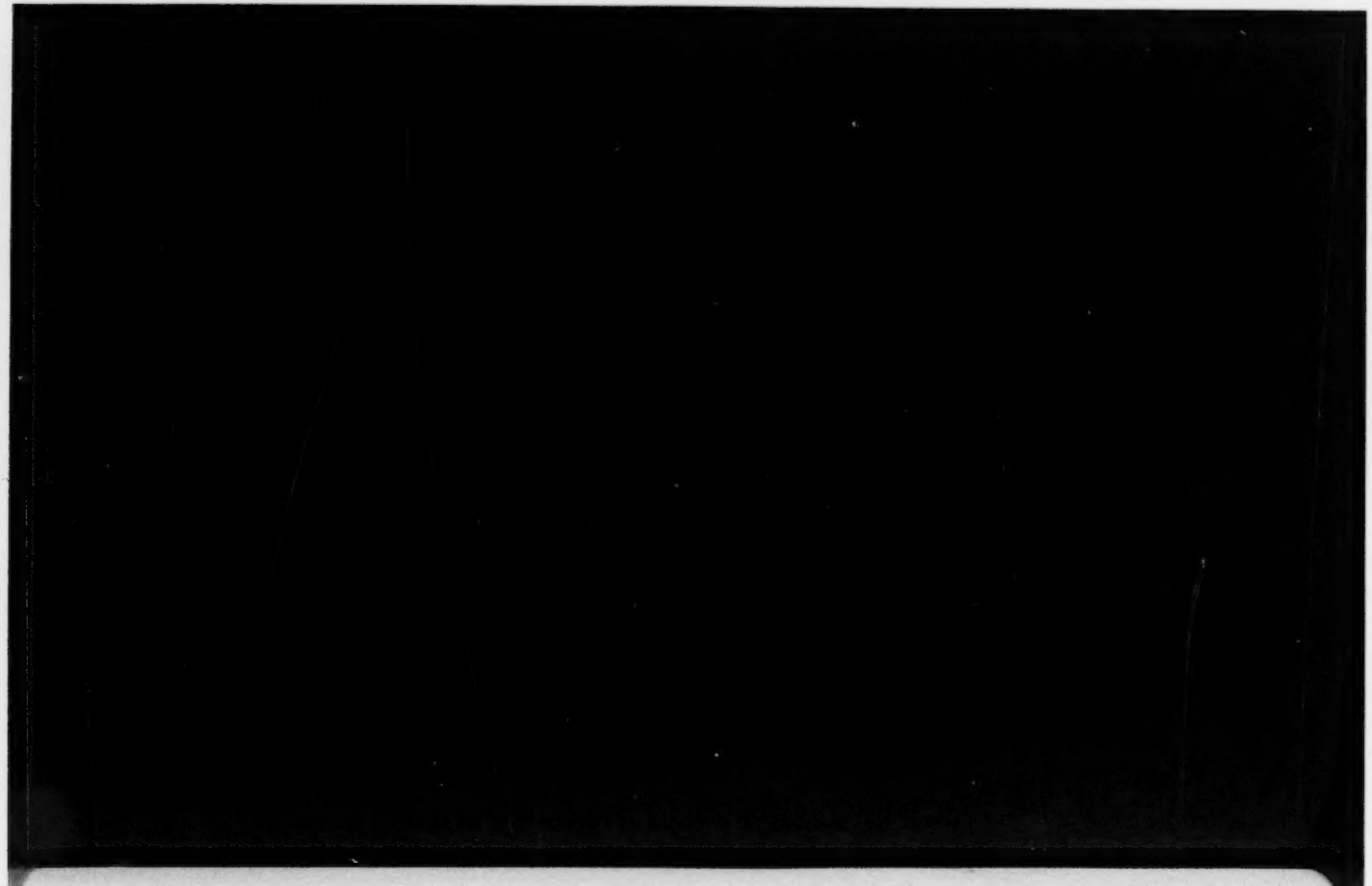
(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any

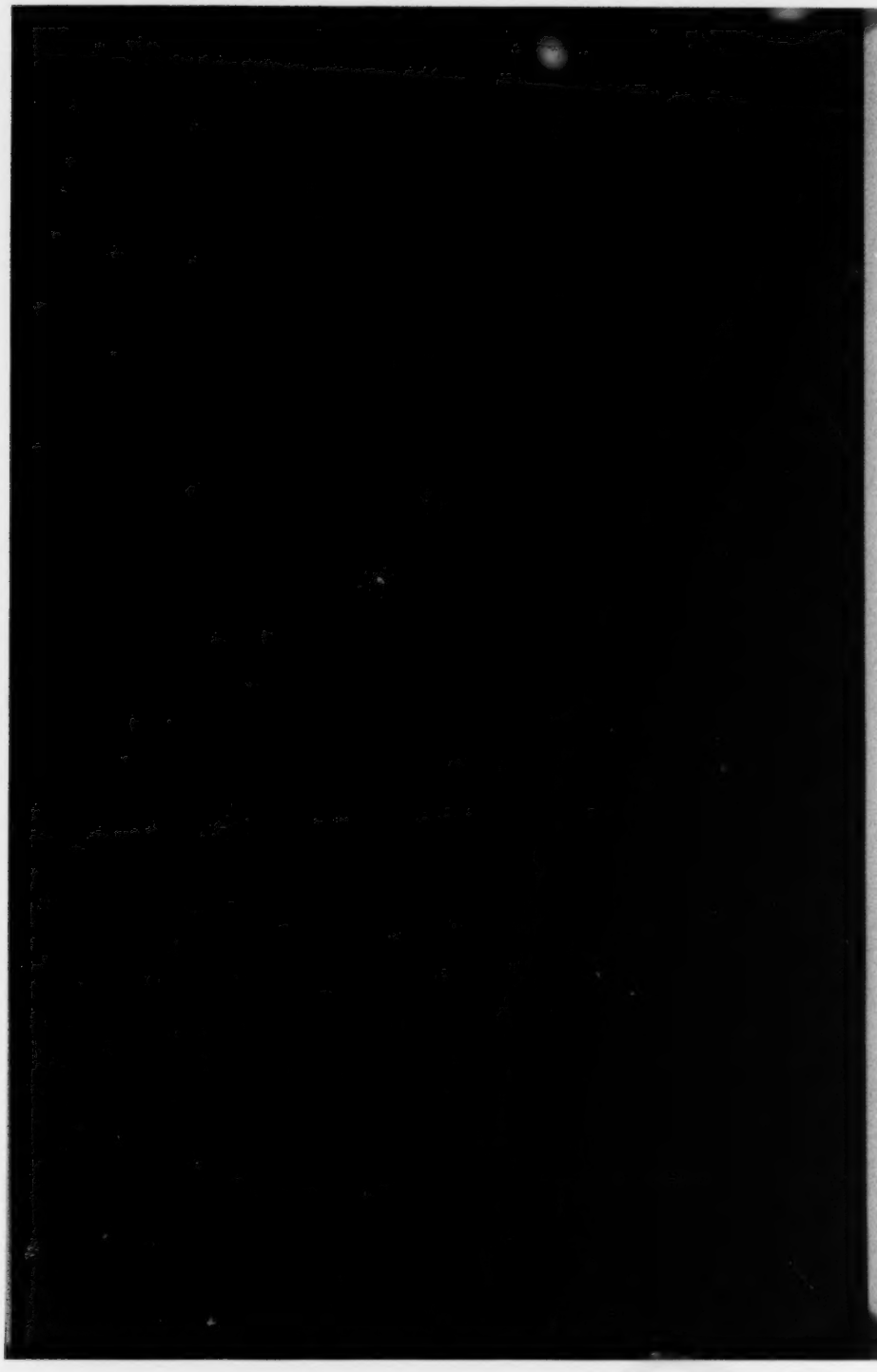
other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

Sec. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or

agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.





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421128—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 628

MCKESSON & ROBBINS, INC., MCKESSON-STEWART-HOLMES DRUG, AND BLUMAUER FRANK DRUG, DIVISIONS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 543–559) are reported in 121 F. (2d) 84. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 497–530) are reported in 19 N. L. R. B. 778.

JURISDICTION

The decree of the court below (R. 563–565) was entered on May 5, 1941. A petition for rehearing filed by petitioner (R. 585–597) was denied on June 21, 1941 (R. 598). The petition for a writ of certiorari was filed on September 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

This petition is a companion to that in *Warehousemen's Union, Local 117, etc.* v. *National Labor Relations Board,* No. 627, this Term. It presents, phrased in various ways, questions 1 and 2 as stated in the Government's brief in opposition in that case, but not question 3.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (July 5, 1935, 49 Stat. 449, 5 U. S. C. Supp. V, Sec. 150 et seq.) are set forth in the Appendix to the Board's brief in opposition in No. 627, this Term.

STATEMENT

A statement of the proceedings before the Board and the court below, including a summary of the Board's findings of fact, conclusions of law, and order, with reference to the supporting evidence, appears in the Board's brief in opposition in No. 627.

ARGUMENT

Petitioner's major contentions, (1) that the Board and the court below erred in construing the Truce Agreement, and (2) that the Board was precluded by the election in the representation case from prosecuting the unfair labor practice proceeding, afford no occasion for review, for the reasons stated in our brief in opposition in No. 627. This brief in opposition will be limited to a discussion of certain subsidiary arguments urged by petitioner in connection with its major contentions.

1. Petitioner contends (Pet. 23–24, 28–30, 35, 43) that even if the Board and court below properly construed the Truce Agreement, discharges made in reliance upon it may not be held to be violative of the Act, "at least" until the Board has interpreted the agreement; and that, under the circumstances of this case, "a charge of unfair labor practices because of actions [under the agreement] cannot be sustained, but only an election ordered to determine the desires of the employees." Petitioner thus in effect urges that Section 8 (3) of the Act be construed to exempt employer discrimination carried out in reliance upon the supposed requirements of an agreement which is, in fact, inapplicable, unless the Board has previously adjudicated the inapplicability of the agreement. The statute clearly affords no such exemption. Cf. *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470

(C. C. A. 9); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board,* 116 F. (2d) 748, 752 (C. C. A. 7), certiorari denied, No. 862, last Term. Nor would an election such as petitioner urges serve any purpose since it would not be relevant in determining the Teamsters' majority status when the closed-shop agreements were made. Moreover, while the coercive effects of petitioner's conduct in enforcing the invalid closed-shop agreements are outstanding, the election cannot in any event demonstrate the free wishes of the employees (see our brief in opposition in No. 627, p. 11).

2. In an attempt to show that the Board's action in the representation proceeding under Section 9 constituted a determination of the issues raised by the charges in the unfair labor practice case under Section 10, petitioner argues (Pet. 33) that if the Board, in the representation proceeding, had believed that the closed-shop contracts were invalid it would, in addition to ordering an election, have ordered petitioner to cease "enforcement [of the contracts], and reinstate the employees in question." The argument completely misapprehends the distinction between proceedings under Section 9 and 10 and the nature of the issue in the representation proceeding (see our brief in opposition in No. 627, pp. 10–11). *Matter of Williams Manufacturing Co.,* 6 N. L. R. B. 135, which petitioner cites (Pet. 33), involved consolidated proceedings under both Section 9 and 10.

3. Petitioner contends (Pet. 20, 44) that the

Board's ruling that the discharges of the employees violated Section 8 (3) and (1) of the Act is in conflict with *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, holding that an employee may be discharged for repudiating his agreement. The contention erroneously assumes, contrary to the concurrent findings of the Board and court below, that the employees were bound by the Truce Agreement to join the Teamsters (see our brief in opposition in No. 627, pp. 13–14).[1]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1941.

[1] The same is true of petitioner's claim of conflict (Pet. 20, 36–44) with *National Labor Relations Board* v. *Electric Vacuum Cleaner Co., Inc.*, 120 F. (2d) 611 (C. C. A. 6), pending on petition for certiorari, No. 588, this Term; and *Peninsular & Occidental Steamship Co.* v. *National Labor Relations Board*, 98 F. (2d) 411 (C. C. A. 5), certiorari denied, 305 U. S. 653.

U. S. GOVERNMENT PRINTING OFFICE: 1941